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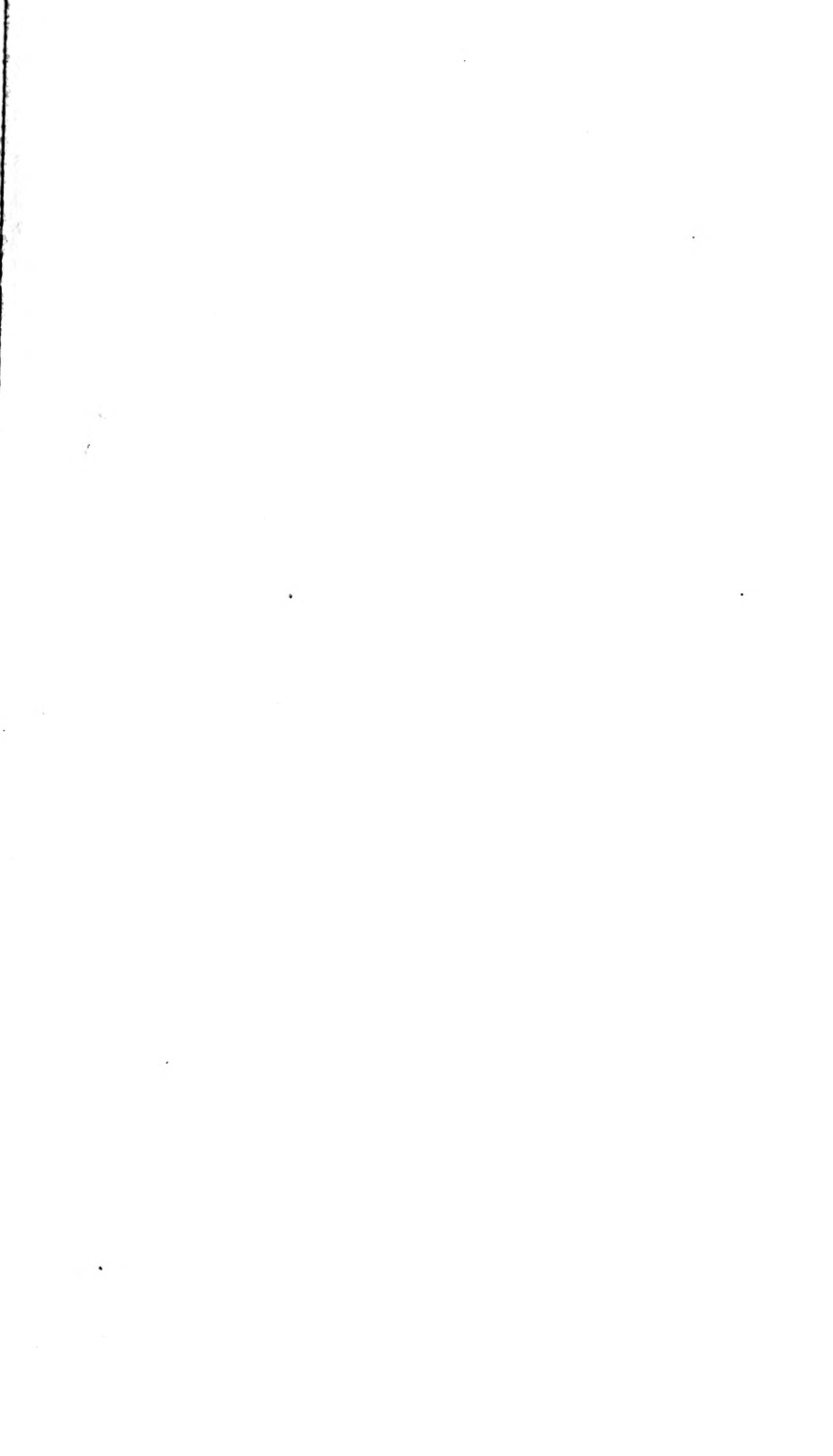
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NO. 12250

United States
Court of Appeals
For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR.,
MARY LOU SCHIEL and LORRAINE SCHIEL,
Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A Corporation,
Appellee.

Opening Brief of Appellants

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Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A Corporation,

Appellee.

Opening Brief of Appellants

JURISDICTION

This suit was brought by New York Life Insurance Company, a New York Corporation, for reformation of a reinstated life insurance policy issued to Frank Schiel, Jr., who had been killed in action, and asking judgment against appellants, citizens of Arizona.

Appellants answered contesting the reformation, and cross-complained asking recovery of the insur-

ance. The jurisdiction of this Court and of the District Court attaches under Judicial Code Sec. 24 (28 U.S.C.A., No. 41) and Sec. 128 (28 U.S.C.A. No. 225). No direct appeal is allowed to the Supreme Court (O'Brien Manual Fed. Appel. Proc., 3rd Ed., page 255). A final summary judgment was entered for appellee on March 9, 1949 (R69); motion to set aside the judgment and for new trial was filed March 9, submitted March 21, and denied April 6, 1949 (R73). Notice of Appeal was filed April 19, 1949 (R73). The appeal is on the final judgment and the whole case and each and every cause of action and matter in controversy, including the ruling on the preliminary equity issue allowing reformation, (R53) (Arnold v. U.S., 263 U.S. 427; Union Central v. Burger 27 F. Supp. 555).

STATEMENT OF THE CASE

There is no evidence, except the Stipulation of Facts on Reformation (R41); and the admissions of appellee seeming to admit our allegations (R40). Our statement is therefore based on pleadings and other papers. Appellants emphasize that the record shows there was no trial at which evidence was admitted to support the complaint. Appellants never had opportunity to offer any evidence or to answer any evidence if it had been offered on the manner of death or other issues.

In 1935 Frank Schiel, Jr., the insured aged 18, was issued a life policy for \$5,000 by the appellee.

Appellants were beneficiaries. The policy had a two year incontestable clause, excepting only non-payment of premiums, disability and double indemnity benefits (R13). It also had a "military" clause making it free of conditions of occupation and military service (R13). It included Arizona statute requirements that the policy constituted the entire contract and no statement shall be used in defense unless a copy be indorsed upon or attached to the policy *when issued*. (R13). The policy could be reinstated within five years from default upon evidence of insurability and payment of arrears in premiums. (R9).

The policy lapsed because of non-payment in 1936 and within five years the insured applied for reinstatement. His application (in a part never attached to the delivered policy) stated that he was desirous of taking aviation training (R19). This country was not at war then. The company demanded that he sign a request for cancellation of double indemnity benefits, and that an aviation clause "A" be added. No reinstatement would be made otherwise (R50). The original policy had no aviation clause.

The policy was delivered as a reinstatement March 29, 1939. It had the double indemnity clause, and mention thereof on the front page, stamped "Void" in large letters (R7). But no copy of the questionnaire on "Aeronautical" activities (R19) and no aviation rider was indorsed or attached and

no copies were given insured. After the reinstatement the company had the policy up again May 1, 1939, for a "Settlement Agreement" (which also was never attached to the policy, R15).

The insured later trained for aviation, became a member of the American Volunteer Group (R63) in China and when this country declared war he remained and became a Major in the Air Force. He was first reported missing in action, and then as killed in action on December 7, later corrected to December 5, 1942, (R103). Death in action was said to be due to "plane crash." No reports state he was "piloting" a plane as stated in Findings (R68). All reports were hearsay as there was not any witness to any crash and the plane and his body were found in a remote region. (R64).

Proofs of death were furnished the company. The latter declined to pay insurance and tendered the alleged reserve of the policy, claiming that death came under an aviation clause which it contended excused payment. Beneficiaries had never seen or known of this clause which was not attached to the policy left by the insured. The tender was declined. The company brought this suit in July, 1943, asking reformation on allegation of mutual mistake and for addition of the aviation rider; alleged that death came within the rider (R4). The beneficiaries, appellants, resisted the suit, on the ground that the incontestable clause barred any reformation; they

denied there had been mutual mistake; denied that death came under the aviation rider, and defended on the ground that the rider was not attached when the policy was issued, either originally or on reinstatement; and demanded payment of the insurance. (R25-33). Rule 13 (a) Civil Proc. makes it compulsory to set up any counterclaim (Union Central Case cited above).

At direction of the court (R34-35) the demand made in answer for the insurance was repeated by a cross complaint, to which answer was made by appellee, before hearing on the reformation issue (R30-39).

The court first took up the reformation part, by stipulation of facts (R41).

Reformation, merely adding the aviation rider to the policy, was ordered in 1945 (R53); leaving open for decision and final judgment whether, as claimed by appellee, death occurred under conditions bringing it within the aviation rider, and for decision on other issues, the cross-complaint, amendments and answers. No trial was ever held although requested (R33).

After numerous pleadings, contested by both parties, the appellee on November 24, 1948, moved for summary judgment (R59). Objection was made by appellants (R61). The court entered minute order granting summary judgment for appellee on January 14, 1949. Findings of Fact and Conclu-

sions of Law were presented later by the appellee, objection was made by appellants, and after making changes the court entered the Findings, Conclusions and Judgment (the only judgment signed in this case) on March 9, 1949. Appellants filed motion to set aside and for new trial. April 6, 1949, the court entered order denying the motion. Notice of appeal was filed, bond was given and statement of points served and filed.

QUESTIONS PRESENTED

1. Was reformation properly allowed after more than two years stated in the incontestable clause had passed?

2. If reformation is allowed to stand, does the aviation rider merely added thereby destroy the assurances in the incontestable and unchanged military clause making the policy free of all conditions of such service, and of other clauses that had become incontestable?

3. Was this a proper case for a summary judgment for appellee?

APPLICABLE PARTS OF ARIZONA STATUTES (Arizona Code Ann., 1939)

Sec. 61-705. Mandatory provisions in certain life policies—no policy of life insurance . . . shall be issued or delivered unless they contain the substance of the following provisions:

3. That the policy constitutes the entire contract between the parties and is incontestable after not more than two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war; . . . that no statement shall be used in defense of a claim under the

policy unless contained in a written application and unless a copy of such statement be indorsed upon or attached to the policy when issued.

Also Sec. 61-107 that unless a correct copy of application is attached to the policy it shall not be considered a part or received in evidence.

SPECIFICATION OF ERRORS

(R74 for Statement of Points)

The District Court erred, to the prejudice and injury of appellants, in:

1. Allowing reformation of the reinstated policy for alleged mutual mistake (R3), because there was no such mistake; under the policy the insured had the right to reinstatement without aviation rider demanded by insurer; and there was no consideration moving to insured for the request he was required to sign.

2. Allowing reformation, because the order of reformation is not sustained by the stipulation of facts (R41); and there was no mutual mistake.

3. Allowing reformation and later giving summary judgment (R69), because more than two years elapsed after acceptance of the reinstated policy before suit for reformation was brought, after death of insured.

4. Striking from the pleadings of appellants allegations material to their defense and action for recovery; including allegation that insured met death as a battle casualty in military service (30-93). This issue was essential if the military clause is not to be ignored and given no effect.

5. Allowing reformation and in allowing the aviation rider as the defense, and giving summary judgment, for the reasons that said rider was not attached to the policy "when issued"; and permitting the rider to be the defense was a violation of the un-

indorsed contract clause (R13), and of the Arizona Statutes, above.

6. Giving the final judgment, because at the time of suit asking reformation merely by adding the aviation rider, all other clauses had already become incontestable. Said other clauses, including the military, cannot be violated and made void by the aviation rider. The court by allowing this rider as a defense violated the incontestable clause as well as the military clause.

7. Giving final judgment to appellee, because even if it had been proved (no evidence was ever admitted) that insured was killed within the conditions of the aviation rider, his death was a battle casualty, a risk of war in military service, and not a risk of aviation under the rider.

8. Allowing reformation and giving summary judgment, because neither the incontestable clause nor the military clause (R13-26) was indorsed to give notice of modification and of elimination of a risk through the addition of an aviation rider, an exception to risks.

9. Giving the final judgment, because no trial was allowed. Appellants, even if it were material whether insured was killed in a plane crash within all provisions of the aviation rider, never had opportunity to offer evidence. The findings, on unadmitted testimony and the summary judgment, are unsupported (R67). There is no evidence that insured met death under the rider which withdrew risks covered by the original and reinstated policy as issued.

10. Granting summary judgment, because:

1. There were genuine issues including: Denial by appellants that death was caused as appellee alleged; and denial (R30) of the arbitrarily stated "reserve" tendered (R39). There was no evidence

ever admitted that death was within the aviation rider.

2. This was a cause involving several issues of law and fact, including reformation. It was not a case for summary judgment for the company on the contested issues. Appellants were entitled to summary judgment if one was to be given without trial, as there was no evidence to support appellee.

11. Giving the final judgment, because there are ambiguities; one is created because the military clause is without indorsement of any modification. And a reasonable interpretation is that the aviation rider did not cover war conditions or aviation in battle during war, but only aviation in peace time or not under battle conditions in war.

12. Giving the final judgment to appellee, because appellants, on the record that can be considered, are entitled thereto as a matter of law as well as of fact, not only on the reformation issue, but also because there were genuine issues and no competent evidence was admitted to support the findings and summary judgment (R67).

SUMMARY OF ARGUMENT

I. Reformation ordered in 1945, as the equity part of the issues (R49-53), allowing addition of the aviation rider, was prejudicial error, because: Reinstatement in 1939 should have been permitted without demand by appellee for elimination of risks (R2-9) reinstatement clause); the rider (as well as the Aeronautical Questionnaire, R19) was not attached to the policy when issued (R7-31); there was no mutual mistake shown; and this was a contest in violation of the incontestable clause.

II. But even if reformation were allowable,

summary judgment, or any judgment, for appellee was prejudicial error, because:

A. If there had been competent evidence that death came under the aviation rider, the death was nevertheless a battle casualty in military service (R30-94-104), a war risk, not an aviation risk; and

B. The clause making the policy free of conditions as to military service, which had become incontestable, and that making the policy incontestable after two years except for the specific exceptions named therein, were not indorsed to show any restriction of the unlimited risks of military service (R13-26); and such unindorsed clauses are superior to the rider which is an exception to risks. (Canton v. Woodside, 90 Fed. 302).

C. These clauses, unindorsed and without indication or fair notice of a modification of risks, if any modification was intended, created ambiguities that must be decided favorably to appellants.

III. Further, giving summary judgment for appellee was prejudicial error, because: There were genuine matters and issues of fact under the pleadings, and of law; and the Findings, Conclusions and Summary Judgment (R67) are not supported by any admitted evidence.

ARGUMENT

I.

REFORMATION WAS ERRONEOUSLY GRANTED

Reformation was ordered by minute order as a preliminary equity issue, decided first in course of the proceedings on the merits of the answer, cross-complaint and answer thereto, that had been filed (R25-35-39). Ordering reformation by allowing the aviation clause or rider to be added to the policy after death of insured and after it had been reinstated for more than three years, was prejudicial error, for several reasons:

A. The policy issued in 1935, had lapsed in 1936, and application to reinstate was made within the time permitted. The company refused unless the insured signed a request cancelling double indemnity, and for addition of the aviation rider. (R21). This latter reduced the risks assumed in the original policy. The insured, untrained in insurance matters, received no consideration for signing that request. It violated his right to have the policy reinstated with the same provisions and risks as originally. Signing this request did not make a contract. The policy as issued and accepted was the contract. A change was made in the risks assumed; no change had occurred in the health or insurability. If an insurer can require a reduction in risks assumed before allowing

reinstatement, then the "right" to reinstate if of no value.

Lanier v. N. Y. Life, 88 F. (2d) 198-199 (CA 5th) states: "In order to apply the incontestable clause it will be helpful to see how and when the reinstatements occurred. They were not wholly new and independent agreements. . . It has been said that reinstatement when the conditions are met is a positive right and may be specifically enforced."

Belser v. Mutual Life, 77 F. Supp. 826 shows that an insurance company cannot on reinstatement require such clauses, exempting war risks or other risks, by claiming they are matters of insurability. *Franklin Life v. Parish*, 109 F. (2d) 276 (CA 5th) states that a reinstatement of a policy results in putting the old contract back in force with the general provisions unchanged. Also see *Bowie v. N. Y. Life*, 105 F. (2d) 807 (CA 10th).

B. When the policy was reinstated and "issued" in 1939, it admittedly did not have any aeronautical questionnaire or aviation rider attached and no copies were ever given to insured (R43). He was warranted in considering that the policy as issued with double indemnity voided, was the final, acceptable to the company, irrespective of what the preliminary negotiations may have been, and that he could rely on the unchanged military clause. The company, after his mouth is closed by death, cannot equitably claim that the policy as delivered was not one that the insured could depend on.

Federal Casualty v. Howe, 38 F. (2d) 741 holds: Unless a correct copy (of application) is attached when the policy is issued, it shall not be received in evidence against the insured.

Stillman v. Aetna Life, 240 Fed. 466,468: "The statute imposes upon the insurance company the duty of attaching a true copy of any application or representations of the insured which by the terms of

the policy are made a part thereof, and of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy; and the omission to do so shall forever preclude it from alleging or proving any such application or representation. No amount of discussion can make this provision of the statute plainer or obscure its meaning."

N. Y. Life v. Cohen, 48 F. (2d) 903: The application is a proposition. . . The company may relinquish or waive. Also *Corley v. Travelers*, 105 Fed. 858, 862, *N. Y. Life v. Hardison* (Mass.) 85 N. E. 410, *McKelvie v. Mutual Benefit*, 287 Fed. 660, (CA 2d), *McMaster v. N. Y. Life*, 99 Fed. 864, 866 (CA 8th).

C. To obtain reformation the company alleged mutual mistake, as a mere conclusion (R3). The insured had died. His version could not be given. The company had the policy up at least once after reinstatement, to add the "Settlement Agreement" (R16), and had opportunity then to correct errors if any.

The stipulation of facts shows no clear and unequivocal evidence of such mistake, as required by all well considered cases. And the Conclusion of Law (R52) that there was mutual mistake is not supported by evidence such as is demanded in a mutual mistake case. The offered conversation with the insured, in the Stipulation was competent, (R47) *New York Life v. Mason* (CA 9th) 272 Fed. 28. The evidence is clear that the mistake, if any, was that of the skilled employees of appellee.

Dutton v. Prudential (Mo.) 193 S.W. (2d) 938

states: On mutual mistake the evidence must be so clear as to exclude any reasonable doubt. Mere preponderance is not sufficient. "Courts of equity do not grant reformation on probability. . . .but only on certainty of error."

In *Metropolitan Life v. Asofsky*, 38 F. Sup. 464 the court states that the "insurer's dilatoriness. . . . in failing to . . . discover its error . . . places it in a position where it cannot in equity and good conscience seek relief." Also see *Hayes v. Travelers*, 93 F. (2d) 568.

D. This policy had a two year incontestable clause. It was originally issued in 1935, was reinstated in 1939, suit for reform was not brought until July, 1943, after death of the insured in December, 1942 (R51). Cancellation is not allowed after death of an insured (*Terry v. N. Y. Life* (CA8) 104 F (2d) 501. Reformation, substantially like cancellation, should also be denied. The suit was a contest, as decided by this Court recently, with irrefutable logic and equity, in the *Richardson* case, below. Previous cases also state like principles. A few of many cases are cited below. The order allowing reformation violated the incontestable clause in this case at bar. That reformation, the only defense of appellee, should be reversed.

Richardson v. Travelers, 171 F. (d) 669 (CA 9th):

This recent case is conclusive. The company there had made a mistake in the type of policy issued. In our case, through alleged mistake the reinstated policy was issued without the rider, and accepted by the insured who paid premiums until his death. The

Schiel case seems even stronger because (1) this was a reinstatement, (2) reformation was not sought until after death and after the policy had become incontestable, and (3) the Arizona Statutes direct that no statement shall be used in defense or received in evidence unless a copy be attached to the policy "when issued." This Court says: "If a suit for reformation were held not to involve a contest of the provisions to be reformed, the insured would be deprived of the very confidence which the incontestable clause was meant to install as to the face value of life insurance policies. This purpose fortifies the construction we have given the clause, and operates to preclude an attack upon the terms of the executed policy through an action for reformation.

"We have had less difficulty in arriving at this result because of the well-settled rule that the defense of fraud is barred by the incontestable clause contained in an insurance policy. It does not seem reasonable to bar the raising of fraud as a defense and at the same time allow the insurer to gain reformation for its own benefit on the ground of an alleged mistake of its own skilled employees."

Mutual Life v. Markowitz, 78 F. (2d) 398 (CA 9th) says that the (incontestable) clause clearly provides that the company saved its right to contest only in matters arising from the restrictions and provisions "specifically" set forth therein.

Also: *N. Y. Life v. Kaufman*, 78 F. (2d) 399 (CA 9th) at 403, *Horwitz v. N. Y. Life*, 80 F. (2d) 297, 301 (CA 9th), *N. Y. Life v. Hiatt*, 140 F. (2d) 752 (CA 9th), *Mutual Reserve v. Austin*, 142 Fed. 402 (CA 1st), *Wright v. Mutual Benefit*, N. Y., 16 Am. St. R. 749, cited in *Richardson* case, *Dibble v. Reliance Life*, 170 Cal. 199, also cited in *Richardson*, *Fidelity Co. v. Bilquist*, 108 F. (2d) 713 (CA 9th), *Bowers v. N. Y. Life*, 68 Fed. 785, *Travelers v. Henderson*, 69 F. (2d) 762 (CA 8th), *McConnell v. Prov-*

ident Life, 92 Fed. 771, Harrison v. Hartford, 30 Fed. 862, Blatz v. Travelers, 68 N. Y. S. (2d) 801, Bernier v. Pacific Mutual, La., 88 A. L. R. 765; Arnold v. Equitable, 228 Fed. 157.

If, as seems certain on basis of the Richardson case, reformation should not have been allowed, and the order granting it is reversed, the Court need not consider the remainder of this brief and argument. We submit that judgment would be entered for recovery of the \$5,000 insurance by the appellants under the terms of the policy, and for interest on overdue payments.

II.

REFORMATION WAS NOT DECISIVE OF THE CASE AND THE RIDER ADDED IS NOT A DEFENSE

Even if the reformation is allowed to stand, that by no means decided the case. The reformation simply added the rider; no other clause of the policy was requested to be reformed in the complaint (R5). All these other clauses and provisions had long since become incontestable. Anything in the added aviation rider that conflicts with the clauses that had become incontestable can be of no validity or effect to violate them. A blanket phrase in such an exception rider cannot be of any effect, or any notice of modifications that might be attempted to be made in other specific clauses.

Can an insurer, by adding a separate exception-

to-risk rider, having a blanket statement "Anything in this Policy to the contrary notwithstanding," charge an applicant with notice that other clauses, not indorsed to show any change, are not in fact true statements to be relied upon. The clause here (R26) making the policy free of conditions as to residence, travel, occupation, and military or naval service, states the only exceptions are conditions relating to Double Indemnity and Disability Benefits. If another exception can be included in a separate clause in another part of the policy, then an inexperienced applicant is misled, and in reality deceived, when he reads the military clause "free of conditions." If an applicant must at his peril read these voluminous policies and search for possible exceptions to clearly stated clauses, then insurance is uncertain and dangerous for any one who is not an expert in contract interpretations.

In *N. Y. Life v. Hiatt, supra*, this Court says in regard to notice: "Here the insurer could easily have avoided ambiguity and eliminated all deceptive repugnancy by adding to the stamped matter some brief expression calling attention to the limitations contained in the rider. If for example, the declaration had read 'Double Indemnity for accidental death, as restricted and defined on page 5 hereof', or language of similar import."

If a reformation, by adding one rider, could change all other clauses that have become incontestable and that have not been specifically reformed, and so indorsed, then incontestability as guaranteed

by the policy and by statute is defeated. This reformation, simply adding the aviation rider, did not determine how that affected other clauses that had become incontestable, or the statutes of Arizona, or make a final decision of the issues. Either the plaintiff or defendants might prevail; which would was not decided until the summary judgment.

Can clauses that have become incontestable, and do not have any indorsement of restriction, be nevertheless restricted, indirectly, by another clause merely added as a reformation after the period of contestability?

Can the addition of the aviation rider be ipso facto allowed to violate the "contract" clause, for instance (R13)? This clause had become incontestable long before suit. If it could have been subject to a request for reformation, a court would not set aside public policy; that clause follows Arizona Statutes Secs. 61-705 (3) and 61-707, *supra*, in requiring that all statements shall be attached to an insurance policy "when issued." Such a requirement cannot be waived:

Prudential Co. v. Niland (N.J.) 93 A.L.R. 381: States that the requirement of statutes "cannot be waived by the insured, since such statutes do not confer a mere personal right but establish a policy." See also *Blatz v. Travelers* and *Bernier v. Pacific Mutual*, *supra*.

Likewise, the military clause, making the policy free of conditions as to occupation and military serv-

ice (R13), had become incontestable. It seems axiomatic that if anything in the added aviation rider conflicts with the said military clause, the latter is superior and must stand unchanged. The military clause is also superior for the reason that the aviation rider contains and is an exception to risks, and as an exception, it is inferior to the unchanged military clause which is not an exception, under the rule stated in *Canton v. Woodside*, above.

Further, even if reformation stands, the summary judgment was prejudicial error under the policy as so reformed, because:

A. It is admitted that death was a battle casualty (R68); and if there had been proof, or if it be conceded for purpose of argument, that death was due to a plane crash occurring *within* the aviation rider, the death was nevertheless a risk of war under the military clause. It was not a risk of aviation, except as the casualty was a military condition brought about or contributed to by plane crash, instead of by shell explosion or some other military condition.

Boye v. U. S. Service Life, 168 F. (2d) 570 (CA Dist. Col.): Boye was the pilot of a plane on a bombing mission to Germany in 1944. He was reported missing. The plane was last seen over Germany. No information except war records "duly admitted" was available as to circumstances surrounding its disappearance. It was believed to have been lost as result of enemy anti-aircraft fire. The policy had an aviation clause. The appellate court reversed a judgment for the insurer. It said it agreed with the dis-

strict court that "the known circumstances point strongly to death by enemy gunfire, or by flames from a burning plane or by *plane crashing upon the land* or falling into the sea. But we cannot agree that death so caused it 'due to operating or riding in any kind of aircraft'." It resulted "from a risk of war that the policy did not exclude."

Bull v. Sun Life, 141 F. (2d) 456; *cert. den.* 323 U. S. 723: Lieut. Bull was on plane forced down onto the sea. An enemy plane strafed it. He was never seen again. Question was whether death was due to a risk of war or a risk of aviation, the policy having an aviation clause. The court says the true intent was to "include the risks of war," and that the death was solely due to "dangers inherent in a war risk." Aviation may have been "a contributing cause but that did not make death an indirect result of aviation."

Also: *Schifter v. Commercial Travelers*, 50 N.Y.S. (2d) 376; affirmed 54 N.Y.S. (2) 408; *Paradies v. Travelers*, 52 N.Y.S. (2d) 290 and *Durland v. N. Y. Life*, 61 N.Y.S. (2d) 200.

B. The clauses (R13) in the policy making it free of conditions as to military service, and incontestable after two years, were never indorsed with any modification. No notice was indorsed on the front page of the policy indicating any restriction of risks (R7). These unindorsed clauses are superior to any after inserted exception, as an aviation rider, if the latter purported to change the other clauses and the military risks assumed by the policy as it was reinstated and delivered. That rider says nothing about the military risks. If it did, that would not be sufficient without indorsement also on or in

the military or other clauses sought to be modified. The rider when considered in connection with the military clause, left unindorsed, is reasonably interpreted to refer to non-war aviation. The statement on the front page that all statements "on ensuing pages" are covered, and statement in the aviation rider "anything in the policy to the contrary notwithstanding," are not notice, under the Hiatt case in which this Court said "The printed general reference (on front page) to all provisions found on the ensuing pages does not fairly reach the point."

The Durland case, *supra*, also shows that the New York Life, on the same kind of policy with the same aviation and military clauses as in this Schiel case, but issued two years later, placed clear indorsement on the military clause "Except as provided by Aviation Rider Attached hereto." This shows that this Company recognized that such indorsement on the clause itself is necessary to give an insured fair notice.

Mutual Reserve v. Austin, *supra*: "The term 'Incontestable' is of great breadth. It is the 'policy' which is to be incontestable. We think the language broad enough to cover all grounds for contest not specifically excepted "in" (quotation marks supplied) that clause." Under this case exceptions to the incontestable, or military, clause, cannot be made by an aviation rider placed in another part of the policy, when no indorsement is made in or on the clauses themselves.

Also: *Provident Life v. Anderson*, 166 F (2d) 492 (CA 4th); *Ness v. Mutual Life*, 70 F. (2d) 59

(CA 4th), cited in Markowitz case supra; *Berniar v. Pacific Mutual*, *Paradies v. Travelers*, *Durland v. N. Y. Life*, and *Schifter v. Commercial*, supra; *United States v. Patryas*, 303 U.S. 341.

C. These unindorsed clauses at least created manifest ambiguities, which under all cases must be decided for the insured. As above pointed out the unindorsed military clause "free of conditions" leads anyone, especially one untrained in insurance, to believe that the aviation rider (if it had been attached when the policy was delivered) did not apply to military death in war as a battle casualty. That it only applied to civilian, or such non-war, aviation as would not come under a risk of war or military service resulting in casualty in war operations:

N. Y. Life v. Kaufman, 78 F. (2d) 403; cert. denied 80 L. Ed. 445, and *N. Y. Life v. Hiatt*, supra. Also *Mutual Life v. Hurni*, 263 U. S., 68 L. Ed. 238; *Mutual Benefit v. Moyer*, 94 F. (2d) 907 (CA 9th); *Swazey v. Mass. Protective Assn*, 96 F. (2d) 265; *Canton v. Woodside*, supra; *Gits v. N. Y. Life*, 32 F. (2d) 7 (CA 7th); *N. Y. Life v. Cohen*, supra, and *Narber v. Calif. Life*, 211 Cal. 176.

III.

THIS WAS NOT A PROPER CASE FOR SUMMARY JUDGMENT FOR APPELLEE

Also, the giving of the summary judgment was prejudicial error. All through the proceedings, as shown by the pleadings, there were genuine issues. In the answer (R30), appellants denied that death was caused as appellee alleged; also (R30, V1) de-

nied the allegations as to "reserve." The cross complaint set up issues also which appear to have been admitted by answer (R40). The court never allowed a trial to require appellee to prove its complaint. No opportunity was ever given appellants to introduce evidence; or any on war records (R100), (not a part of the record for consideration because never admitted in evidence). The deposition is simply indorsed "Filed" (R85). It was never offered or admitted as evidence. There is no showing that these were *all* the war records. At least one was only an an "extract" (R89-94), and they were subject to change and correction. No chance was given to object to their weight, as allowed under Title 28 U.S. C.A. No. 695, or to object to or rebut statements in the deposition. See also 26 C.J.S. page 943: Adverse parties are entitled to object to a deposition; and Rule 26 (e) Civ. Proc. gives a right, "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof." The deposition, (R86), shows contradictions and has opinion and interpretations of the witness. Can a company get a deposition, in a far place, and then have it made conclusive evidence, without any opportunity to object or rebut on the part of the opposite party who is not able to be represented on the taking of the deposition. The record on appeal shows the above were never admitted in evidence.

This case involved several issues, equity, ques-

tions of fact, weight of evidence (if any had been admitted on a trial for which a jury had early been requested). It was not a case for a summary decision for appellee on assumed facts and conjecture and by a determination of weight of such assumed evidence.

Wittlin v. Giacalone, 154 F. (2d) 20 (CA Dist. Col.): "It is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers." Summary judgment was reversed. Also *Aronson v. K. Arakelian*, 154 F. (2d) 234 (CA 7th); *Hawkins v. Frick*, same, page 88 (CA 5th); *Zarate Co. v. Park Bridge Co.*, same, page 381 (CA 2d); *Sprague v. Vogt*, 150 F. (2d) 801 (CA 8th); *Sartor v. Arkansas Co.*, 321 U.S. 627, 88 L. Ed.; *Strauss v. Strauss*, Cal., 203 P. (2d) 957; *Minuto v. Mutual Life*, R: I., 179 Atl. 713.

As there was no admitted evidence on the issue of manner of death, the findings, conclusions and summary judgment (R67) are wholly unsupported, and we submit that appellants were, and are, entitled to judgment. Even if the unadmitted deposition and records had been introduced, they fail to show that death came within the aviation rider. The burden was on the appellee to prove this in every respect. (*Bebington v. Calif. Western*, Cal., 180 P. (2d) 672). There is no evidence, as before stated, to support Finding of Fact 4 (R68) that the insured,

while serving as an officer in the U. S. Army was killed when the plane, he “was then piloting” crashed. No proof was ever offered to show that the plane was not licensed, or that death was a result of operating or riding therein. Death could have been due to injuries received before or after the alleged crash, or from enemy action or shock and exposure after landing. (64).

There was no evidence to support Finding of Fact 5 (R69) that the “reserve” was \$448.80. The reserve was computed by the appellee on basis unknown. The appellee should have been required to prove all allegations by clear, unmistakable and unequivocal evidence, not by hearsay and conjecture, and by a mere unproved statement.

If the company made “mistakes” on the aviation rider, and in failing to attach the part of the application on aeronautics and the Settlement Agreement as before pointed out, are not appellants entitled to proof on its allegations, that it did not make another?

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed and judgment entered for the appellants for the full insurance of

\$5,000, to be paid in accordance with the terms of the policy and with interest on the past due payments.

Respectfully submitted

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By A. G. BAKER,
Attorneys for Appellants.

The Bank of Arizona Building
Prescott, Arizona

No. 12,250

IN THE
United States
Court of Appeals

For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY
LOU SCHIEL and LORRAINE SCHIEL,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Appellee.

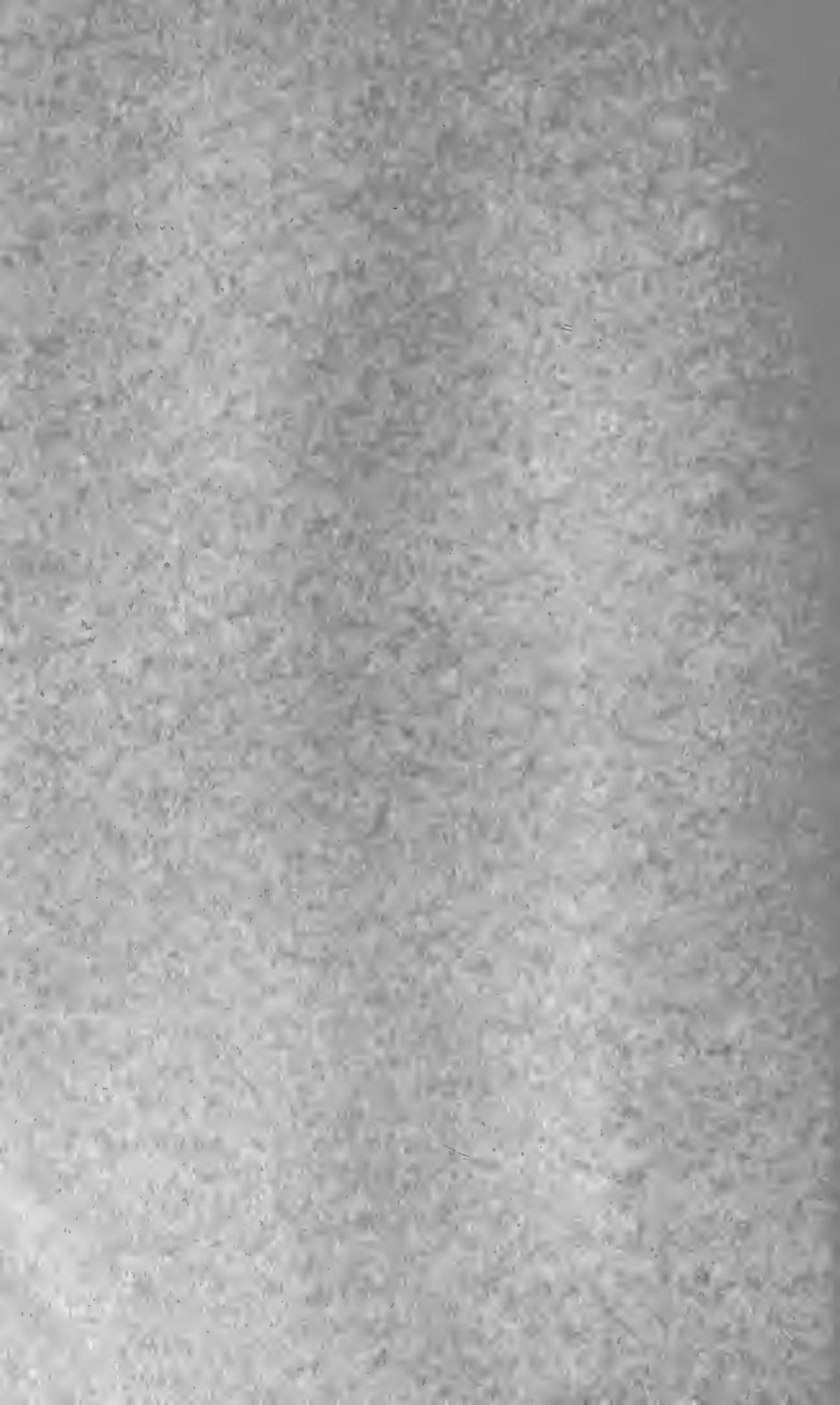
APPELLEE'S BRIEF

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No. 12,250

IN THE

United States
Court of Appeals

For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY
LOU SCHIEL and LORRAINE SCHIEL,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

So that the Court will have a clear cut picture of the proceedings in the District Court, we deem it necessary to briefly supplement appellants' statement of the case.

The issue of reformation raised by appellee's complaint and appellants' answer was decided by the District Court upon a stipulation of facts (R. 41). The Court made

findings of fact and conclusions of law (R. 49) and on September 12, 1945 entered judgment as follows:

“The Court having heretofore made and entered its Findings of Fact and Conclusions of Law in the above-entitled matter, now, therefore, by reason of the law and the findings aforesaid

“IT IS ORDERED, ADJUDGED AND DECREED that Policy No. 12,666,606 issued by New York Life Insurance Company, a corporation, plaintiff herein, to Frank Schiel, Jr., the insured, be and the same is hereby reformed and corrected to evidence the true agreement between plaintiff and the insured by having endorsed on said policy and incorporated therein as part thereof the following:

PERMANENT AVIATION CLAUSE

Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or riding in any kind of aircraft whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this Policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend addi-

tions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy.

NEW YORK LIFE INSURANCE CO.

New York, March 29, 1939 FREDERICK M. JOHNSON
Secretary

DONE in open Court this 12th day of
September, 1945

DAVE W. LING
Judge of District Court''

(R. 53)

No appeal was taken from the judgment.

Thereafter, appellants filed their second amended cross-complaint whereby they sought recovery of \$5,000.00 representing face amount of the life insurance policy for which reformation had been adjudged (R. 54). Appellee interposed an answer alleging that the death of the insured fell within the provisions of the aviation clause and that appellants therefore were entitled only to the reserve on the policy in the amount of \$448.80 (R. 57).

Appellee took the depositions of Major Clark Marshall of the United States Army for the purpose of establishing the cause of insured's death and the same was duly filed herein (R. 86). Appellee also secured and filed the affidavit of Charles W. V. Meares, Secretary of appellee for the purpose of establishing the amount of the reserve upon the policy at the time of insured's death (R. 60). An affidavit of appellant Frank Schiel, Sr. was filed in the cause, presumably for the purpose of casting doubt upon the accuracy of the records of the War Department (R. 62).

The affidavit was based on hearsay, did not disclose the existence of any competent evidence which would impugn the *prima facie* effect of the War Department records attached to the deposition of Major Marshall and was not in substance and form as required by Rule 56(e) of the Rules of Civil Procedure. The official Report of Death disclosed that the insured died on December 5, 1942 as a result of "injuries incidental to airplane crash. Direct cause of death fracture of skull, multiple fracture of the long bone." An extract from the official Squadron history of the 74th Squadron, 23rd Fighter Group reads:

December 5

Major Schield and Major Schwartz took off in P-38's today on a reconnaissance mission. Major Schwartz made a forced landing at Eweiyang after becoming separated from Major Schiel. The latter was found some days later, His plane had apparently crashed full speed into the *sied* of a mountain, south-east of Kunming, and burst into flame." (R. 100)

On November 5, 1948 appellee filed a motion for summary judgment pursuant to Rule 56(b)(c) of the Rules of Civil Procedure for the reason that "the pleadings, depositions and affidavits on file herein show that there is no genuine issue as to any material fact" (R. 59). The District Court granted the motion (R. 66), made findings of fact and conclusions of law (R. 66), and on March 9, 1949 rendered judgment as prayed for by appellee, namely, that appellants have and recover from appellee only the sum of \$448.80 representing the reserve on the policy (R. 70). This appeal followed.

SUMMARY OF ARGUMENT

I.

The judgment of reformation entered on September 12, 1945 was final and appealable. This Court does not now have jurisdiction to review the same.

II.

Should this Court conclude that the judgment of reformation is open to review:

(a) Appellee had the right to insist upon the inclusion of the aviation clause as a condition to reinstatement.

(b) Reformation of the policy was not precluded by the clause making it incontestable after two years from its date of issue.

(c) The policy provision that it and the application "constituted the entire contract" does not preclude reformation.

(d) By reason of mutual mistake of the parties reformation was required in order to express the true agreement.

III.

Appellee was entitled to summary judgment for the reasons:

(a) The pleadings, depositions and affidavits on file disclose that there is no genuine issue as to any material fact.

(b) The aviation clause limited the risk assumed by appellee with respect to military as well as civilian aviation.

ARGUMENT**I.****Judgment of Reformation Not Open for Review**

By its complaint appellee sought reformation of the contract of insurance. Such relief was available under the equity jurisdiction of the District Court. By their cross-complaint the appellants invoked the common law jurisdiction of the Court to recover the face amount of the policy. It was necessary that the Court first exercise its equitable jurisdiction for the purpose of determining the true contract between the parties. Thereafter—assuming the existence of a genuine issue of fact—appellants were entitled to a trial of their common law claim. Rule 42(b) of the Rules of Civil Procedure reads as follows:

“SEPARATE TRIALS. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.”

Rule 54(b) of the Rules of Civil Procedure (prior to 1946 amendment) reads:

“JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall determine the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so

entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.”

Under authority of the Rules above quoted, the District Court entered upon a determination of the equitable issue raised by the complaint, based upon a stipulation of facts. Judgment of reformation was entered on September 12, 1945. The judgment was final and appealable.

In the case of *Bruckman v. Hollzer*, C.C.A. 9, 152 Fed. 2d 730, this Court recognized that in an action where both equitable and common law claims were asserted, they should be separately disposed of. That the judgment entered herein upon the equitable issue was final and appealable is decided by this Court's ruling in *Hanney v. Franklin Life Ins. Co.*, C.C.A. 9, 142 Fed.2d 864. In that case the amended complaint contained two counts, the first of which attempted to state a claim on the policy as written. The second sought reformation. The District Court entered judgment dismissing the first count, and an appeal was taken to this Court. Appellee moved to dismiss the appeal upon the ground that the judgment appealed from was not final. The motion was denied upon the ground that the two counts involved distinct claims. In making its decision this Court relied upon *Reeves v. Beardall*, 316 U.S. 283, 62 Sup. Ct. 1085, 86 L.Ed. 1478, 1479, wherein the Supreme Court stated:

“That rule (54(b)), the joinder provisions (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the court to order a separate trial of

any separate claim or issue indicate a 'definite policy' (Collins v. Metro-Goldwyn Pictures Corp. *supra* ((CCA 2d) 106 F(2d) p. 85) to permit the entry of separate judgments where the claims are 'entirely distinct.' 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. Bowles v. Commercial Casualty Ins. Co. (CCA 4th) 107 F(2d) 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of,' though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329.

The Rules make it clear that it is 'differing occurrences or transactions which form the basis of separate units of judicial action.' Atwater v. North American Coal Corp. (CCA2d) 111 F(2d) 125, 126. And see Moore, *op. cit.*, 92-101; 49 Yale L.J. 1476. If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under Sec. 128 of the Judicial Code."

The application of the *Reeves* decision in the *Hanney* case of necessity required the conclusion that a claim for reformation and a claim on the contract are "entirely distinct" and that they arise out of "differing occurrences or transaction." The same is true of the case at bar. It is clear that the transaction or occurrence upon which appellee's claim was bottomed was the mutual mistake of the parties. The transaction or occurrence upon which

the cross-complaint was based was the death of the insured. The evidence in support of one claim was entirely different from that which would be adduced in support of the other. There was no issue of law or fact common to both.

The time within which appellants could have sought review by this Court of the judgment of reformation expired at the end of three months following entry thereof, namely, on December 12, 1945. 28 U.S.C.A. 230. It is elementary that this Court now does not have jurisdiction to review that judgment.

Hill v. Chicago and Evanston Ry. Co., 140 U.S. 52,
11 Sup. Ct. 690, 35 L.Ed. 331;

Lamb v. Shasta Oil Co., C.C.A. 5, 149 Fed.2d 729.

II.

Reformation Properly Allowed

Although we are confident that this Court lacks jurisdiction to review the judgment of September 12, 1945, we submit—in the event this Court decides that such judgment is reviewable—that the District Court did not err in entering such judgment.

A. INCLUSION OF AVIATION CLAUSE AS CONDITION OF REINSTATEMENT.

Appellants argue that appellee had no right to insist upon the inclusion of the aviation clause as a condition to reinstatement. The policy provides:

“This policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of *evidence of insurability satisfactory to the Company* and payment of overdue premiums with interest at six per cent per annum there-

on from their respective due dates.” (Emphasis supplied) (R. 9).

The Supreme Court of Arizona has held in the case of *Equitable Life Assur. Soc. of United States v. Pettid*, 40 Ariz. 239, 11 P.2d 833, that under a reinstatement clause similar to that above quoted the insurer may require as a condition to reinstatement, evidence of insurability satisfactory to it, not only with respect to conditions of health but as to other conditions also material to the risk. The Court said:

“It is urged by plaintiff, and apparently the trial court gave some weight to her contention, that, since there was evidence in the record showing that the insured was in good health at the time of his death, the furnishing of the certificate of health was immaterial. The answer is that the condition of the policy in regard to reinstatement was not merely that insured should be in good health, but that, as a condition precedent to reinstatement, he should furnish evidence, not merely of good health, but of insurability to the satisfaction of defendant, a matter involving other elements than personal good health.” (11 P.2d 839.)

In the case of *Kansas City Life Ins. Co. v. Phillips*, 31 Ariz. 122, 250 P. 882, 884, the Supreme Court of Arizona stated:

“The hereinbefore quoted parts of the application for reinstatement show an agreement as to when a lapsed policy would be considered reinstated. Under it the filing with the insurer of an application to be reinstated, and the payment of the past-due premiums, are not enough. These are only preliminary

steps, and, after receiving them, insurer has a right to satisfy itself as to the character of the risk and whether it has been changed or become more hazardous than when the policy was issued."

It is clear that appellee had the right—in view of insured's disclosure that he intended to engage in military aviation (R. 19)—to decline reassumption of a risk which had become more hazardous, and that appellee could have unconditionally rejected the application for reinstatement. Had such action been taken, it would not have been subject to review by the courts. The Supreme Court of California points out:

"The contract in question clearly provides, as above stated, that what shall constitute 'satisfactory evidence' is a question for the company to determine. It is purely a private matter addressed to the discretion of those officers of the company charged with the responsibility of determining such question, and is in no sense that judicial discretion which appellate courts have the authority to review. In the final analysis, whatever the word 'insurability' means, the contract provides that the evidence thereof must be 'satisfactory to the company.' That question having been determined by virtue of and according to the clear and unequivocal terms of the agreement, there is nothing, under the circumstances presented herein, for judicial determination." (Greenberg v. Continental Casualty Co., 24 Cal. App. 2d 506, 75 P.2d 644, 649.)

Accord:

Lanier v. New York Life Ins. Co., C.C.A. 5, 88 Fed.2d 196;

Kirby v. Prudential Ins. Co. of America, 191 S.W.2d 379 (Kan.);

Kallman v. Equitable Assur. Soc. of United States, 288 N.Y. Supp. 1032, aff'd 272 N.Y. 648, 5 N.E.2d 375 (N.Y.).

As appellee had the right to refuse reinstatement completely, it follows that it could elect to offer reinstatement upon any condition it wished to impose. In this case the effect of appellee's action was to reject the application to reinstate the policy as written and to offer a new policy—one that included the aviation clause. This offer was accepted by the insured.

B. REFORMATION WAS NOT PRECLUDED BY THE INCONTESTABLE CLAUSE.

In support of their contention that the incontestable clause precluded reformation, appellants cite the opinion of this Court in *Richardson v. Travelers Ins. Co.*, C.C.A. 9, 171 Fed.2d 699. We respectfully submit that the rule announced in the *Richardson* case is erroneous and should be expressly overruled. The opinion of Judge Orr, concurred in by Judge Healy—Judge Bone dissenting—is directly contrary to the rule adopted by five very respectable appellate courts with no judges dissenting.

Buck v. Equitable Life Assur. Soc. of United States, 96 Wash. 683, 165 Pac. 878;

Columbian Nat. Life Ins. Co. v. Black, C.C.A. 10, 35 Fed.2d 571, 71 A.L.R. 128;

Equitable Life Assur. Soc. of United States v. Rothstein, 122 N.J. Eq. 606, 195 A. 723; aff'd 199 A. 43;

Mates v. Pennsylvania Mutual Life Insurance Co.,
 316 Mass. 303, 55 N.E.2d 770;
American Nat. Ins. Co. v. McPhetridge, 28 Tenn. A.
 145, 187 S.W.2d 640.

That two judges have one opinion and thirty-five (30 appellate and 5 *nisi prius*) judges of presumably equal sagacity hold to the contrary does not, purely by weight of numbers, prove the two to be wrong. The great disparity between the advocates of pro and con does, however, justify a careful scrutiny of the reasoning of the minority.

In reaching his conclusion Judge Orr decides *in limine*:

(a) The term "policy" in the incontestable clause does not refer to the agreement which the parties intended (which through mutual mistake they failed to accurately express in the writing) but rather to the writing which purports to embody the agreement.

(b) "Mistake" like "fraud" is an "inception defense" and because the incontestable clause bars one it must bar the other.

For the purpose of analyzing Judge Orr's reasoning, let us pose an example: Assume (a) that the parties wish to make a contract, the original draft of which contains an incontestable clause; (b) that one of the parties objects to the clause and upon discussion it is agreed that it will be deleted; (c) that the typist inadvertently includes the clause in the final draft; (d) that the parties sign the final draft without noticing the inclusion of the incontestable clause; and (e) that one of the parties seeks reformation of the writing, such reformation to include deletion of the incontestable clause.

By the application of Judge Orr's reasoning, it will be decided that the contract can not be reformed by deleting the incontestable clause. Since the incontestable clause is valid and binding until deleted by reformation, it therefore precludes its own removal because to challenge the clause would be to contest the valid contract. As Judge Orr states it:

"Assuming that the mistaken provision in the absence of an incontestable clause, could be reformed, nevertheless, it along with the remainder of the provisions constituted a contract which bound the parties until rescinded, reformed or otherwise modified. See, *Berenson v. French*, 262 Mass. 247, 159 N.E. 909; *Williston on Contracts*, Sec. 15. For this reason it cannot properly be assumed that the document embodying the policy is invalid, and therefore argued that the incontestable clause has no effect on an action to reform the policy." (*Richardson v. Travelers Ins. Co.*, 171 Fed.2d 699, 701)

Judge Orr overlooks the fact that although the writing may be treated, and given effect, as a valid contract at law even though it does not express the true intent of the parties. the writing will not be treated, or given effect, as a valid contract in equity. Thus the problem found in our example is solved—when it appears that the writing does not express the intent of the parties, equity gives no force to its provisions and proceeds to reform the writing to the end that it will represent the true agreement of the parties. Equity has no difficulty in ignoring the incontestable clause because the parties never intended that it be a part of the contract. Furthermore, in equity the term "contract" (or "policy", if you please) as used in the

incontestable clause, and which is not to be contested, can refer only to the true agreement of the parties and not to the writing which is not the "contract" of the parties.

An analogous situation is presented when reformation of an insurance policy is sought in the face of a statutory or contractual provision that the policy constitutes the entire contract. Such a clause forms a more reasonable basis for an argument against reformation than does an uncontested clause. The former in effect says "you shall not go outside this writing to find the intent of the parties." The uncontested clause merely says "you shall not challenge the validity of the contract." If equity can ignore the former it must certainly ignore the latter. In the case of *American Merchant Marine Ins. Co. v. Tremaine*, C.C.A. 9, 269 Fed. 377, Judge Gilbert, speaking for this Court stated:

"We think that the statute has no relation to the subject-matter of the present suit. This is not a case of the construction of an insurance contract. The appellant is not here attempting to assert rights under the contract. It is here seeking to reform the written expression of the contract as found in the policy, and have it set forth the true agreement upon which the minds of the contracting parties had met, and had expressed in writing, and which by accident and mistake had not been included in the policy. The effort is to let into the contract something entirely distinct from the sense and construction thereof. The statute was clearly never intended to stand in the way of the reformation of insurance policies, or to curtail a power which is everywhere conceded to courts of equity.

Many states have adopted similar statutes, the object whereof is to require that the whole agreement between the insurer and insured shall be expressed in the policy. But in so legislating there is no denial of power to reform contracts of insurance. To provide that, if a copy of the application is not delivered to the assured, it shall not become a part of the contract, is not to say that a court of equity may never correct a mutual mistake after the policy is delivered.”

It logically follows from Judge Gilbert’s opinion that no statement or restriction in a writing will be recognized as a bar to reformation if demanded by equity. In accord:

City of Lawrenceburg v. Maryland Casualty Co.,
16 Tenn. A. 238, 64 S.W.2d 69; and
North Carolina Mut. Life Ins. Co. v. Martin, 223
Ala. 104, 134 S. 850.

Judge Orr begs the question when he states that mistake, like fraud, is an “inception defense”—“the very objects for which the incontestable clause was originated.” This is but to say that the clause was inserted to preclude rescission for fraud or reformation for mutual mistake. Such assumption as to the motive which prompts insertion of the clause is obviously an unsound basis for a conclusion which does violence to the purpose as expressed in the clause. That purpose is to eliminate any question as to the *validity* of the policy after the expiration of the contestable period.

Burns v. Mutual Ben. Life Ins. Co., D.C. Mich. 79
Fed. Supp. 847;
Posner v. New York Life Ins. Co., 56 Ariz. 202, 106
P.2d 488;

Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449,
169 N.E. 642;

New York Life Ins. Co. v. Veit, 294 N.Y. 222, 62
N.E.2d 45.

The defense of fraud does, of course, question the validity of the contract entered into by the parties. An action for reformation based on mutual mistake does not. The statement made by the 10th Circuit in the *Columbian* case cannot be gainsaid:

“This is not a contest of the policy, but a prayer to make a written instrument speak the real agreement of the parties. It would hardly be suggested that an assured, who brings an action to reform a policy and to recover under it as reformed, was contesting the policy within the meaning of this clause. Yet the clause is not one-sided, and the right of the assured to have the writing express the agreement actually made is no greater than the right of the assurer.”
(35 Fed.2d 577)

We naively suggest that the purpose of courts of law and equity is to promulgate or at least recognize and apply principles which will promote justice and fairness. That the rule announced in the *Richardson* case can serve only to subvert such purpose is forcefully pointed out by the Supreme Court of Washington in the *Buck* case:

“The provision in the policy that it should be indisputable after one year as to the amount due avails naught to respondent. The appellant is not attempting to dispute the policy nor prevent a recovery thereon. It is simply contesting as to the amount due thereon. ‘The amount due’ in the language of this clause can

mean no other sum than the amount due in law and fact. Appellant is seeking, not to avoid the payment of this amount, but to have the policy truthfully express the amount correctly due. The vice of respondent's contention that the amount written in the policy is incontestable after one year is shown by a simple illustration. Suppose that, instead of writing the amount correctly as \$408, the decimal point had been omitted and the amount read \$40800. No one would have the hardihood to contend that in case of non-discovery of the mistake until after the lapse of one year appellant would be bound to pay such sum to respondent and was forever barred both in law and fact from contesting the amount shown to be due on the face of the policy." (*Buck v. Equitable Life Assur. Soc. of U. S.*, 165 P. 879)

This court should also bear in mind that if the *Richardson* rule is to stand, it will cut both ways. Should an insured come before this Court to reform a policy and recover under it, he will find it hard to appreciate the logic which compels him to accept \$20.00 (in accordance with the written policy) when it was intended that he should receive \$2000. We quote in part a wholly disinterested note relative to the *Richardson* case found in 62 Harvard Law Review 890:

"Prior to the decision in the instant case it had generally been held that the incontestable clause was not a bar to reformation if the insurer would have been otherwise entitled to a decree. E.g., *Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571 (10th Cir. 1929). See I Appleman, Insurance Law and Practice, 402 (1941). The clause, required by statute in many states, is designed to protect the policyholder from a

lawsuit contesting the validity of the policy after considerable time has passed and evidence of the facts surrounding the purchase may be unavailable.

To effectuate this purpose it has been held that the incontestable clause prohibits the insurer from raising the defense of misrepresentation after the specified period. E.g., *Mutual Life Ins. Co. of N. Y. v. Heilbronner*, 116 F.2d 855 (8th Cir. 1941) *cert. denied*, 312 U.S. 707 (1941); *Berkshire Life Ins. Co. v. Weining*, 290 N.Y. 6, 47 N.E.2d 418 (1943). The court in the principal case relies on these decisions in reaching its result. But the incontestable clause has been held not to bar litigation on the extent of the risk covered by the contract. E.g., *Burns v. Mutual Benefit Life Ins. Co. of Newark*, 79 F. Supp. 847 (W.D. Mich. 1948). A reformation of the policy to conform with the terms of the agreement seems more closely analogous to the latter cases than to those in which the insurer contests the validity of the contract on the ground of fraud. Protection of the policyholder does not require that reformation for mistake be denied, since he will receive all the benefits for which premiums have been paid. Furthermore, allowing benefits incommensurate with the premiums paid is contrary to the well recognized policy, often enforced by statute, against discrimination among insurance purchasers of the same class. *Young v. Metropolitan Life Ins. Co.*, 28 Ohio N.P. (N.S.) 179 (1930)."

The note found in Vol. 97, No. 5 (April 1949) *University of Pennsylvania Law Review* 741, with respect to the *Richardson* case is well worth consideration. We quote:

"The purpose behind incontestability clauses is to assure certainty of the insurer's liability and thus

promote the security and repose function of life insurance. Consistent with such purpose, courts have reasoned that inasmuch as insurers have a reasonable time to investigate and ascertain the facts, they assume the risk of waiving invalidating defects. So also it is argued that the incontestability clause must refer to the terms of the policy as written since otherwise the insured would be deprived of the very confidence which such clauses were intended to instill. Such reasoning, although pertinent to defenses such as fraud, does not seem applicable in the case of mutual mistake since it fails to recognize the substantial difference in the effect of the two types of defenses. The former result in rescission and total avoidance of liability; the latter, in reformation and assurance of liability. Reformation effectuates the real agreement and, consistent with the reason for the clause, gives the insured the security requested. Furthermore, even if the parties can be said to have relied on the writing, which seems questionable if the mistake is mutual, they will not be prejudiced since they are getting the fund paid for and are deprived only of a windfall. In overlooking these factors, the court seems to have extended the scope of incontestability clauses beyond that anticipated by either the insured or the insurer.”

This Court should not lose sight of the fact that in the *Richardson* case it was attempting to determine and apply the law of California and that it based its decision upon California precedent. Here we are concerned with the law of Arizona. If we advert to decisions of the Supreme Court of Arizona we find that instruments, including insurance policies, will be reformed for mutual mistake,

Northwestern Nat. Ins. Co. v. Chambers, 24 Ariz. 86, 206 P. 1081;

Korrick v. Tuller, 42 Ariz. 493, 27 P.2d 529;

and that an incontestable clause has application only to a contest as to the validity of a policy, not to the extent of coverage.

Posner v. New York Life Ins. Co., 56 Ariz. 202, 106 P.2d 488.

In the *Posner* case the court stated:

“We then consider whether the incontestability clause of the policy barred any effort to show a pre-existing disease. It must be observed that the defense was not that the policy was *invalid* because of previous existing disease, but that the disability claimed by plaintiff was not covered by the terms of the policy. * * * The incontestability clause did not apply to the situation.” (106 P.2d 492) (Emphasis supplied).

In this action we are attempting to ascertain the extent of the risk covered by the agreement made by the parties, namely whether or not death through aerial flight is a risk covered by the policy. The validity of such agreement is not questioned.

If this Court should adhere to the *Richardson* rule as expressing the law of California, there is, nevertheless, no basis—in the face of Arizona authorities cited—for assuming that such rule prevails in Arizona. We respectfully submit that the *Richardson* rule is not sound, that it can only be deemed to be an expression of California law, that in the light of Arizona precedent it must be deemed that the *Columbian* rule accurately reflects the law of Arizona.

C. PROVISION THAT POLICY CONSTITUTES ENTIRE CONTRACT DOES NOT PRECLUDE REFORMATION.

We have discussed hereinabove the contention that a provision, included in a life insurance policy pursuant to statute, to the effect that the policy constitutes the entire contract precludes reformation. We have found that it does not.

American Merchant Marine Ins. Co. v. Tremaine,
C.C.A. 9, 269 Fed. 377;

City of Lawrenceburg v. Maryland Casualty Co., 16
Tenn. A. 238, 64 S.W.2d 69;

North Carolina Mut. Life Ins. Co. v. Martin, 223
Ala. 104, 134 S. 850.

D. REFORMATION DEMANDED BY MUTUAL MISTAKE.

Appellants vaguely suggest that the record does not support the conclusion of mutual mistake. We submit that there could not be a clearer case than this demanding reformation on that ground. After the lapse of the policy insured applied for reinstatement and disclosed that he intended to engage in military aviation (R. 18, 19, 42). Appellee indicated that reinstatement would be made only upon exclusion of double indemnity benefits and inclusion of the aviation clause (R. 42-47). Insured then requested in writing that the policy be reinstated as suggested (R. 20, 24, 42) with inclusion of the aviation clause. Upon reinstatement the double indemnity clause was deleted but through clerical error the aviation clause was not endorsed upon the policy (R. 46). That reformation will be granted under such circumstances is well settled by the case of *Flimin's Adm'x. v. Metropolitan Life Ins. Co.*, 255 Ky. 621, 75 S.W.2d 207 and the numerous authorities cited therein.

III.

Appellee Was Entitled to Summary Judgment**A. NO GENUINE ISSUE AS TO ANY MATERIAL FACT.**

Rule 56(e) of the Rules of Civil Procedure with respect to summary judgment states:

* * * "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In this case, as we pointed out hereinabove, the pleadings, affidavits and depositions on file disclosed the non-existence of a genuine issue as to any material fact. The records of the War Department authenticated by the deposition of Major Clark Marshall show that insured's death resulted from injuries which he sustained in the crash of an airplane which he was piloting (R. 89-94, 100, 101, 104). These records are *prima facie* evidence of the facts therein stated. 28 U.S.C.A. 1733, 1734.

Gilmore v. U. S., C.C.A. 5, 93 Fed.2d 774;

Taylor v. Latimer, 47 Fed. Supp. 236;

Thatenhorst v. U. S., C.C.A. 10, 119 Fed.2d 567;

Joy v. Joy, Tex. Civ. App., 156 S.W.2d 547;

Mitchell v. City of Mobile, 244 Ala. 442, 13 S.2d 664;

Weis v. Weis, 147 Ohio S. 416, 72 N.E.2d 245.

The affidavit of Frank Schiel, Sr. filed by appellants (R. 62) is not entitled to consideration because wholly hearsay. Rule 56(e) of the Rules of Civil Procedure.

The District Court was more than justified in concluding that in the event of trial the *prima facie* case established by the War Department records could not be rebutted and that, therefore, there was no genuine issue as to any material fact for determination upon a trial. It was for situations such as this that the Rules of Civil Procedure provide for summary judgment.

Wilkinson v. Powell, C.C.A. 5, 149 Fed.2d 335.

B. DEATH ARISING FROM MILITARY SERVICE DOES NOT PRECLUDE APPLICATION OF AVIATION CLAUSE.

Appellants take the position that because the policy included a clause to the effect that it is free of conditions as to military and naval service, the aviation clause must be limited to death arising from civilian aviation. They insist that there is ambiguity between the two clauses and that such ambiguity will be resolved in favor of the insured.

In this case there can be no ambiguity between the military clause and the aviation clause. The former was contained in the policy when issued. The latter was added by reformation as of the time of reinstatement. It reads:

“Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or

riding in any kind of aircraft, whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this Policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy.” (R. 23) (Emphasis supplied.)

The first phrase of the clause disposes of any charge of ambiguity. In the light of such language the clause will override anything to the contrary that might be contained in the policy. Even in the absence of such language it is clear that the addition of the clause subsequent to the original issuance of the policy requires that the latest expression of the intent of the parties shall control.

In determining whether or not the death of insured while operating a military plane was excluded as a risk, we need not and can not look beyond the terms of the aviation clause. The clause includes the term “any kind of aircraft.” It cannot be argued that this term excludes civilian, military or any other type of aircraft—it is all-embrasive. In view of the fact that the insured was not riding as a passenger on a licensed airline—within the exception contained in the aviation clause—there is no room for contending that insured’s beneficiaries are entitled to receive any more than the reserve on the policy.

A number of courts have had occasion to pass upon the question of whether or not an aviation clause, similar to that involved in this action, will preclude recovery of the full amount of the policy where death results from partici-

pation in military or naval aviation. They have held with substantial unanimity that such clause does preclude recovery in the event of death in such manner.

Green v. Mutual Ben. Life Ins. Co., C.C.A. 1, 144 Fed.2d 55;

Hyfer v. Metropolitan Life Ins. Co., 18 Mass. 175, 61 N.E.2d 3;

Knouse v. Equitable Life Assur. Co. of Iowa, 163 Kan. 213, 181 P.2d 310;

McKanna v. Continental Assur. Co., 165 Kan. 289, 194 P.2d 515;

Wilmington Trust Co. v. Mutual Life Ins. Co., D.C. Del. 76 Fed. Supp. 560;

Burns v. Mutual Ben. Life Ins. Co., D.C. Mich. 79 Fed. Supp. 847;

Thoma v. New York Life Ins. Co., 30 Northam. Law Rep. Pa. 369;

Barringer v. Prudential Ins. Co., D.C. Pa. 62 Fed. Supp. 286, aff'd 153 Fed.2d 224.

As pointed out in the *Burns* case, the decisions in *Boye v. United States Service Life Ins. Co.*, C.C.A. D.C., 168 Fed.2d 570, and *Bull v. Sun Life Assur. Co.*, C.C.A. 7, 141 Fed.2d 456, cert. den. 323 U.S. 723, which are cited by appellants, do not support a contrary conclusion. In the *Bull* case the insured had landed a sea plane; it was disabled and he was trying to inflate a rubber boat for the purpose of escape when he was fatally injured during strafing from a Japanese plane. The court correctly concluded that insured's death resulted from gunshots rather than from aviation. In the *Boye* case the court reached the same conclusion by reason of the lack of any evidence

indicating that the insured's death resulted from other than gun fire. In the case at bar death of the insured was directly caused by the crash of his plane and resulting skull fracture.

CONCLUSION

We respectfully submit that the judgment of reformation was final and is not subject to review at this time. In any event reformation was properly allowed in the application of equitable principles implicit in the law of Arizona. There is nothing in the record to indicate that the *prima facie* effect of the war department records—disclosing death within the terms of the aviation clause—could be rebutted upon a trial. Idle speculation as to any other possible cause of death cannot destroy the probative effect of the facts established by the records and the reasonable inference flowing therefrom.

Barringer v. Prudential Ins. Co. (D.C. Pa.), 62 Fed. Supp. 286, aff'd 153 Fed.2d 224.

The district court was justified in concluding that there was no genuine issue as to any material fact and that summary judgment was demanded as a matter of law.

Respectfully submitted,

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NO. 12250

United States
Court of Appeals
For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR.,
MARY LOU SCHIEL and LORAIN SCHIEL,
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A Corporation,
Appellee.

Reply Brief of Appellants

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Reply Brief of Appellants

*Reply to Appellee's Argument I "Judgment of
Reformation Not Open for Review"*

Appellee claims presumably that the judgment for reformation was final, and appellants were *required* to appeal from it without awaiting final judgment in the case. This is not so. As we have pointed out, the appellee started this suit before appellants considered negotiations were ended and before they

felt it necessary to bring their action for recovery. In the complaint not only reformation was asked, but appellee made the suit unquestionably a contest by setting out that insured was killed as a result of operating an aircraft contrary to the aviation clause, and asked that appellants be required to accept a "reserve" as final judgment in the whole case. (Lanier case cited by both parties hereto).

Under the rules appellants were compelled to set up their cross-claim for recovery of insurance, else they would have waived it and lost their right. There was no "invoking" of common law jurisdiction by appellants. The reformation and other judgments requested by appellee and the cross-claim of appellants became one case (29 Am.Jur.246) by the rules and order of the court. The court took up the reformation part as the preliminary issue necessary to be decided before the case as a whole could be tried and final judgment given. Reformation is granted even though no recovery can be had by reason thereof, *Kelsey v Agriculture* (N.J.) 79 A.539. So the court could thereafter have made a final judgment for appellants on the whole case, in spite of reformation. In fact the order of reformation left undecided the other demands for relief above mentioned, in appellee's own Complaint. If appellants had appealed before the final judgment, this Court would have dismissed the appeal as premature because there would have been no injury to them and unless the

lower court made a final decision against them on the whole case.

It is elementary that no appeal can be taken unless statutes so provide. No statute has been cited giving appeal from a preliminary order of reformation in a case like this where the rules compel the equity and law issues to be litigated. The only appeals from interlocutory decrees are given under 28 U.S.C. Par.227, in cases of injunctions, receivers and admiralty. There is no case cited or found that holds that reformation, when a preliminary equity issue in a case like this, *must* be appealed before final judgment. The Supreme Court, and many other courts, have dismissed many appeals made on preliminary rulings and before final disposition of the whole case. They have said that a case cannot be brought up "in parcels". The cases seem clear also that even where some such judgments are final for purposes of appeal, such appeal may be made, but is not *required* to be made, until final judgment in the whole case.

Arnold v U. S., 263 U. S. 427 (cited in Opening Brief) shows that an appeal from the preliminary judgment of reformation could not have been maintained.

Bowker v U.S., 186 U.S. 135: A case cannot be brought up in parcels.

Crooker v Knudsen (CA 9) 232 Fed.858: Decisions are not appealable unless made so by statute. No judgment is final which does not terminate the litigation between the parties on the merits. O'Brien Manual Fed. Appel. Proc. pp 23, 25, 28, 29. Victor

Talking Machine v George (CA 3) 105 F (2d) 697, which states the rules and show that an appeal is not required until final determination of the whole case.

Also: 4 C.J.S. p. 180; American Mills v American Surety, 260 U.S. 362; Hamilton-Brown v Wolf, 240 U.S. 257; Adler v Seaman (CA 8) 266 Fed. 840; Western Silo v Morris (CA 8) 33 F. (2d) 285; Frick v Namm, 21 F. (2d) 179; Johnson v Solomons (Cal) 12 Pac. (2d) 140.

If an appeal from a decision on the reformation issue in a case like this *must* be made without waiting for final judgment, there should be statute so requiring. Otherwise how can an appellant tell. Must an experiment be made to find out whether appealable. We submit that in equity as well as by law and court decisions this reformation issue in this kind of a case is reviewable on this appeal from the final judgment and any other intermediate order.

IIA

Reply to Appellee's II A "Inclusion of Aviation Clause as Condition of Reinstatement."

In this Argument appellee says that it "could have unconditionally rejected the application for reinstatement" and "As appellee had the right to refuse reinstatement completely, it follows that it could elect to offer reinstatement upon any condition it wished to impose." To be fair to an insured, then, that Clause should read "No reinstatement will be

made at any time unless the company in its sole judgment so desires.”

The Greenberg case concerns an accident and health policy, not life insurance. Cases distinguish these two kinds (*Greber v Equitable*, 43 Ariz. 13; 28 Pac. (2d) 817); and this Greenberg opinion points out authorities (647) holding that the insured has a right (on reinstatement) to the same conditions, and insurer has “no right to exact other conditions.”

II B

Reply to Argument II B “Reformation was not precluded by the Incontestable Clause”

Appellee considers that the decision in the Richardson case is erroneous. It says that two judges are against a claimed thirty five. If a thing is right, the fact that a majority oppose does not make it less righteous. However we respectfully urge that the two do not take their “minority” too much to heart until they see what many other judges in cases cited by us, as well as many others, have thought of the principles underlying the Richardson case. It may be found they are in a minority so large as to be a majority.

Numerous cases also bring out that an insurance “contract” and the construction thereof should be considered with the fact that there are skilful, expert and accurate parties on one side, and ordinarily pa-

pers are simply accepted by a novice. He does not know of any possibility that a "contest" will not mean all contests. And that when the company, after he is dead, discovers an application that he signed on the dotted line and forgot, it can sue to reform the policy and escape paying insurance that his family was depending on.

We think that the decision in *Richardson* that reformation, as applied in a case like this *Schiel* cause, cannot be made after the incontestable period, needs no defense.

Appellee talks about the "true agreement" as if signing an application made a contract. There is no contract until the policy is accepted by the insured. And then the insured can rely on it. *Northwestern v Chambers*, 24 Ariz. 86, cited by appellee confirms: The "insured has the right to rely on the presumption that the policy he receives is in accordance with the application." If it is not, only the insured can complain; the insurer should not be allowed to change the policy after the contestable period.

American Merchant Marine v Tremaine, cited, seems clearly inapplicable for appellee. The court says: "The appellant is not here attempting to assert rights under the contract." In this *Schiel* case, from the start, appellee was asserting rights under the contract—to have the court declare that insured was killed within the conditions of the aviation clause, and to declare appellants must accept the reserve.

Appellee thus made a contest; it did not ask reformation alone, but went on and asserted rights. So even under cases that allow reformation because not considered a contest, appellee has no support. It should have asked for reformation only; then waited to see if appellants would assert a right of recovery. The Tremaine case therefore seems conclusive that the complaint in this case, "attempting to assert rights under the contract" made a contest.

The Buck case is simply correcting a figure that already was *in* the policy. Court: "The appellant is not attempting to dispute the policy nor prevent a recovery thereon." Correcting a figure *in* a policy is quite different from asking to insert an outside clause and prevent recovery of the insurance thereby.

There is no Arizona case deciding the questions herein, as appellee seems to infer. There is no case supporting the Columbian case rule in any way. Arizona cases cited certainly do not support any claim that they have decided that a reformation by adding a clause which might prevent recovery, would be allowed after death of the insured and after the incontestable period. The Korrick case relates to reformation of a deed. Posner case relates to accident insurance not to life. The court restricts its statement to "policies of this nature."

II D

Reply to II D "Reformation Demanded by Mutual Mistake."

Flimin's case is not a leading one. In deciding on "the natural and reasonable inferences" that there was mutual mistake the case is contrary to numerous federal and other cases, cited by us, that on application to reform mistakes must be supported by clear, unequivocal and convincing proof. (Also *Harrison v Hartford*, 30 Fed. 862; *Bowers v N. Y. Life*, 68 Fed. 785; *Travelers v Henderson* (CA 8) 69 Fed. 762). Let us suppose that there had been an application clause wherein Schiel had asked something favorable to him, as waiver by the company of the suicide clause. The company does not attach this to the policy issued to him. He does not notice the omission. After his death (if it had been suicide) some note is found by the beneficiaries among his effects that some such request had been made. They have no copy of the clause to prove anything. They write to the N. Y. Life. It replies saying that "by reason of mistake, inadvertence or oversight" of their employees the company has no record, if any clause was ever received. Anyway it had the right to refuse and send him the policy for him to accept if he desired, and he had done this. Would the beneficiaries get a reformation against the company?

The "reasonable" inference" and we think the

clear evidence in this Schiel case is that there was no mutual mistake. But negligence or lack of reasonable care by the company which had opportunity even later to correct if there had been error, reasonably accounts for the claimed error.

It is common knowledge that the ordinary person signs an application as the agent urges and takes the agent's interpretation of what is meant in the statement he is signing. The insured feels he can find out what he has signed when the policy comes, and can either accept or refuse. He is not given any copy of what he signs at the time. The application in this case states the insurance shall not take effect until and unless the policy is delivered (R 16). How can an insured be held to have made a contract until the policy is delivered and received. How can he be held as having completed any agreement which is not attached to the policy when issued, so that he can be definitely advised of what the company is including as the final contract. Cannot an insured, not guilty of fraud or effort to get undue profit, rely on the policy offered to him for acceptance, as including all the contract so far as the company is concerned. In this case a "reasonable inference" is that Schiel, if an aviation clause had been attached, might in going over the policy before acceptance have made more inquiry as to the effect of the clause. If he had been advised that there was a possible conflict with the military clause he could have declined to accept

until cleared up to his satisfaction. There would then have been no "mutual mistake", and it can not be assumed that he made a mutual mistake in accepting the policy without any such aviation clause. He was not given a fair chance. It is, to say the least, unfair to refuse to let an unskilled insured rely upon the policy delivered under the facts of this case.

III

Reply to III A "Appellee Was Entitled to Summary Judgment A. No Genuine Issue as to Any Material Fact"

Appellee has not answered our statement of the fact, beyond dispute, that the deposition of Major Marshall taken in Washington, and the copies of some of the war records obtained, were never offered in evidence so that objection or rebuttal could be made. And they were never introduced; merely put with the file of the case as in any deposition sent to the Clerk for custody until trial.

Appellee ignores Title 28 U.S.C.A. Par. 695, which in providing that records made in regular course of business are admissible, permits "all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight." This does not change the shop book rule so as to make such records *prima facie* and considered as being automatically admitted without being offered at any

trial. In Arizona at time of trial the deposition can be challenged until the party offering shows that the witness is not in Arizona available at the trial. Such records should not be admitted en masse. (Lundblad v U.S. 98 Ct. Claims 397, cited in notes to said Par. 695).

The Gilmore case cited does not say that records simply filed in the Clerk's office, as here, are ipso facto prima facie evidence which can be considered as conclusive without presentation and opportunity to rebut.

Appellee says that the affidavit of Frank Schiel Sr. (p 3 its brief) was "presumably for the purpose of casting doubt upon the accuracy of the records", and (p 23) is "wholly hearsay." The affidavit was made when motion was made for summary judgment on the Meares affidavit that proof of loss listed "plane crash" as the cause of death. Appellee seemed to consider this conclusive. Therefore it was necessary for us to make the Schiel affidavit in reply, so as to not waive the issue as permitted by the settled rule that admissions in such proofs to insurance companies are subject to explanation. They are not conclusive and proof may be presented that they are erroneous. Appellants were prepared to testify on a trial, but when this motion was made the affidavit was filed with the objection to the motion. The affidavit showed that the listing was given as plane crash on hearsay presumption but information later

made the reason doubtful, and certainly the statement was not any admission, or intended as any, that death or plane crash came *within any aviation clause* which had never been attached to the policy held by appellants. (Supreme Lodge v Beck, 181 U.S. 49, 94 Fed. 752 in lower court; and Culley v N. Y. Life (Cal) 163 Pac (2d) 703).

As to hearsay we consider it ill becomes appellee to make any criticism. It is apparent on the face of the deposition and war records that they were substantially if not wholly hearsay. They were made by persons who had no personal knowledge whatever as to this death of an honored air force youth in China. These Washington records were in turn based on statements made by persons in China who had no personal knowledge but who gathered information from any possible hearsay source, naturally inaccurate and incomplete in an active battle area where careful investigation of what had occurred without witness in a remote and practically inaccessible place was impossible. The witness in the deposition, Major Marshall, admittedly had no personal knowledge; but he was never the less asked for his personal opinion of interpretations of the records of events he personally knew nothing about. He was not asked and did not testify that these were *all* the records on this case. It was the duty of appellee to show this, especially as the records show the date of death had at first been stated as a different date,

and other records did not harmonize on other statements. The statement in the Schiel affidavit was by Major Baumler who was a personal friend and with Major Schiel in the Flying Tigers and present in the vicinity at the time of death. This is not "wholly hearsay". At one place he states that he was told by the engineering crew. But much is what he as a companion in arms personally knew, being on the ground in China. At any rate what appellants stated as plane crash in the proof of loss was based on hearsay; if the affidavit could not be considered, then it is also unfair to try to hold them to their statement made in good faith based upon hearsay.

III B

Reply to III B "Death Arising from Military Service Does Not Preclude Application of Aviation Clause."

Appellee simply cites cases which it considers support the above. It must, and apparently does, acknowledge that there are other cases to the contrary. We submit that these other cases support the more liberal and fair view that where there is a military clause and an aviation clause, the death of a soldier as a battle casualty in the battle area is a risk of war and insurance is payable. The appellee's cases take a narrow and stringent view that a contract calls for a construction which will give its "pound of flesh."

Attempt is made to distinguish two of our cases. But this Court will notice that the Bull case decides that a risk of war is covered by insurance where the policy has an aviation clause. The fact that the plane in that case had landed before death (the same might have been true in the Schiel case if all facts were known) is not material to the correctness of the decision and holding that a risk of war (whatever such risks may be decided in each case to be) is covered.

The Boye case also holds that a risk of war is covered, and then decided that death "by plane crashing upon land" would be a "risk of war that the policy did not exclude," and not "due to operating or riding in any kind of aircraft." These are recent decisions, the Boye being very recent, decided by the Court of Appeals of the District of Columbia. We urge that this fair and reasonable rule be followed.

It will be noted that no answer is made to our Argument II B, that neither the incontestable nor the military clauses were indorsed to show a modification by an added clause, if change was intended. No explanation is made of the Durland case where such indorsements were made by this same company on the same kind of policy and clauses as in the case at bar. The court indicates that if such indorsements had not been made the decision would have been against the company. By making such indorsements there is in effect an admission by this company that

they should have been made on this policy. There was no attempt by the company to reform by having the indorsements added in this case.

Also no answer to our point in the first part of our Argument II, in which we ask how the military and other clauses which had become incontestable before this suit, can be violated and made of no effect by simply ordering this aviation clause to be added to the policy. Certainly the aviation clause cannot be considered as having been added prior to the commencement of the incontestable period in 1941. If it were so considered the military clause is allowed to be violated, contested and made of no effect, contrary to the incontestable clause. This would mean that an incontestable clause is worthless as to all clauses that may conflict when a reformation by addition of a clause eliminating a risk in the original policy is allowed after the contestable period.

CONCLUSION

This is not a case where there was any fraud or lack of good faith on the part of the insured. It is the case of a young man, who later made an outstanding and honorable record, and who had tried to protect his parents and sisters by insurance. Did he do so? We think he did. It is respectfully submitted that for any or all the reasons assigned the

judgment of the lower court be reversed and judgment entered for appellants for the amount of insurance clearly stated in the policy, to be paid as provided in the policy, with interest on past due payments.

Respectfully,

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No. 12,250

IN THE

United States
Court of Appeals

For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR.,
MARY LOU SCHIEL and LORRAINE
SCHIEL,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY
a Corporation,

Appellee.

PETITION FOR REHEARING

EVANS, HULL, KITCHEL & JENCKES
JOSEPH S. JENCKES, JR.

807 Title & Trust Building
Phoenix, Arizona

IN THE

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NEW YORK LIFE INSURANCE COMPANY
a Corporation,

Appellee.

PETITION FOR REHEARING

COMES NOW New York Life Insurance Company, a corporation, appellee in the above entitled cause, and presents its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

The Court has ruled that after lapse of the life insurance policy involved herein, and upon application of insured for reinstatement, appellee could not take into consideration the circumstances of insured relative to residence, travel, occupation and military and naval service for the purpose of satisfying itself as to his insurability. Because of the ruling of the Supreme

Court of Arizona in *Equitable Life Assurance Soc. v. Pettid*, 40 Ariz. 239, 11 P.2d 833, and its apparent disposition of any question as to the right of the company to determine insurability upon a consideration of all matters material to the risk in addition to personal good health we did not, in our brief or in oral argument, give more than passing attention to the issue with which the opinion of the Court deals. For that reason we deem it not only appropriate, but our duty, to ask for rehearing. We are confident that a reconsideration of the issue will show that the opinion of the Court is contrary to applicable Arizona law.

With respect to the term "insurability" in the reinstatement clauses of life insurance policies, there are two divergent rules. The first: That "insurability" embraces matters other than good health. Note particularly the decision of the Supreme Court of Arizona in the *Pettid* case, *supra* and the opinions of the Utah and Missouri courts which rely upon it.

Gressler v. New York Life Ins. Co., 108 Utah 173, 156 P.2d 212;

Kirby v. Prudential Insurance Co., (Mo.) 191 S.W.2d 379, 162 ALR 660.

The second: That "insurability" is not more comprehensive than the term "good health." This rule stems from *Sussex v. Aetna Life Insurance Co.*, 38 Ont. L. Rep. 365, 33 DLR 549. The author of the annotation found at 162 ALR 668 reconciles the rules as follows:

"The term 'insurability' as applied in the policy provision dealing with reinstatement embraces all matters which the insurer took into consideration when issuing the original policy, and only those. Thus, while 'insurability' is construed as having a broader meaning than 'good health,' it does not

permit the insurer to take into consideration, for the purpose of reinstating the policy, facts into which it did not inquire at the time the original policy was issued.”

The author indicates that the *Pettid* case supports this view.

It is our impression, from the Court's opinion that the Court does not quarrel with the *Pettid* case and the interpretation placed upon it by the Utah and Missouri courts in the *Gressler* and *Kirby* decisions and by the author of the above mentioned Annotations. This court appears to take the position that the *Pettid* rule is made inapplicable by the inclusion in the insurance policy of the so-called “occupation clause.” It seems clear that the Court's conclusion was prompted by the attempt of the Missouri court, in the *Kirby* case, to distinguish the *Sussex* case on the basis of the occupation clause. We are quite certain that an analysis of the occupation clause will demonstrate that it cannot qualify or limit the reinstatement clause in this respect.

It is self-evident that when a life insurance policy lapses, its remaining vitality (outside of nonforfeiture value, if any) resides solely in the reinstatement clause. The surviving rights of the insured (ignoring forfeiture values, if any) are measured by such clause and not by any other portion of the policy—such other portions are dormant. Under the reinstatement clause the insured is entitled to reinstatement if (1) he pays the overdue premiums and (2) presents evidence of insurability satisfactory to the company. In this context what is meant by “insurability”?

“Insurability” means “capable of being insured.” Whether or not a person is capable of being insured depends upon a consideration of all factors material to

the risk. The number of such factors is in direct proportion to the scope of the coverage, i.e. risk to be assumed. In other words, if the coverage is limited such factors will be few. As coverage increases so do the factors material to the risk. If, for example, a policy of insurance covers only injuries sustained while riding upon a railroad train, the only factor material to the risk would be the insured's likelihood of using such means of conveyance and the frequency thereof. On the other hand, if a policy of insurance covers death from any cause, then any facts or circumstance which would increase or decrease such hazard would be material to the risk assumed. Therefore, although the reinstatement clause is self-contained, we are permitted to look at the insuring clauses of the policy to determine the scope of the risk which the company is asked to reassume.

In the instant case the policy (ignoring the suicide and double indemnity provisions) was unlimited. The face amount of the policy was payable upon the death of the insured from any cause or by any means. Before accepting such a comprehensive risk, appellee required the applicant to undergo a physical examination and to answer numerous questions relative to his occupation, residence, intentions as to travel, aeronautic activities, consumption of spirits, etc. (R. 17). The appellee considered all such factors to be material to the risk which it was asked to assume. It cannot be contended that such practice was at variance with standard life insurance procedure. The policy was issued and thereafter lapsed for non-payment of premium. Insured asked for reinstatement to which he was entitled upon payment of delinquent premiums and a showing of evidence of insurability satisfactory to appellee. The dormant insuring provisions of the policy were exactly

the same as they were when the policy was originally issued. The scope of the risk which appellee was asked to reassume was exactly the same as it originally assumed. The factors material to the risk to be reassumed were the same as the factors material to the risk originally assumed. Under such circumstance insurability with respect to reinstatement could mean nothing more nor less than insurability with respect to original issue. Appellee thus entered upon a consideration of exactly the same factors it had considered when the policy was originally issued and found that the hazards of the insured's death had increased by reason of a change in insured's circumstances with respect to participation in aeronautics. (R. 17, 18). It decided that insured was not now insurable upon the basis of unlimited coverage.

Contrary to the conclusion reached in the Court's opinion, appellee was not precluded by the so-called "occupation clause" from considering any and all factors material to the risk which it had considered when the policy was originally issued. The occupation clause is merely a statement of fact:

"This policy is free of conditions as to residence, travel, occupation and military and naval service, except as to provisions and conditions relating to double indemnity and disability benefits." (R. 13).

The clause does not in anywise extend or restrict the coverage of the policy or the liability of the appellee thereunder. The purpose of the clause is—from a sales standpoint—to call attention to the applicant that the policy is unlimited as to coverage, and that he can engage in any occupation, reside or travel anywhere, or join the army or navy without affecting the liability of appellee to pay the face amount of the policy upon

his death. The liability of the appellee would have been exactly the same whether such clause were included or excluded. As the inclusion or exclusion of the clause from the policy does not change the scope of coverage, it is clear that its inclusion or exclusion cannot change the meaning of "insurability".

The following example will show why the occupation clause cannot be deemed to modify the term "insurability" in the reinstatement clause. Let us assume that the occupation clause is amplified to read:

"This policy is free of conditions as to residence, travel, occupation, contraction of or exposure to disease, consumption of spirits, financial or domestic difficulties, social habits and military and naval service."

The contractual force of our amplified clause is no greater nor less than as originally written. It merely gives greater emphasis to the unlimited coverage of the policy. It makes clear to the insured that no matter how circumstances may change, his insurance protection shall in nowise be limited. Let us further assume that the policy lapses and on application for reinstatement the company ascertains that the applicant, originally an accountant in good health, is now suffering from cancer, is drinking to excess and has changed his occupation to that of a movie stunt man. The company refuses reinstatement, but offers to issue a policy similar to that which has lapsed but modified to the extent that in the event of death resulting directly or indirectly from cancer, stunting accidents or drinking, only a restricted amount will be payable. The applicant then takes the position that this is an offer of reinstatement and that under guise of reinstatement the company is undertaking to rewrite the contract in such fash-

ion as to repudiate risks assumed at the outset. He points out that if the company can do this it can with equal facility exclude altogether any and all other risks referred to in the "occupation clause", whereas his liberty of action in all such matters was a measure of his insurability fixed and determined by the terms of the original contract. The patent absurdity of such contention makes it startlingly clear that "insured's liberty of action" in all those matters (his right to contract or expose himself to any disease, to drink intoxicating liquors, to engage in any hazardous occupation whatsoever, etc.) is not a measure of insurability—it is a measure of the company's liability—a liability which terminates upon lapse. We have seen that if such liberty of action has any bearing whatsoever upon insurability it is to increase rather than limit the factors material to the risk upon a consideration of which insurability is determined. A contrary construction of our hypothetical "occupation clause" would mean that because the company had assumed an unlimited risk at the outset it must, after lapse and upon payment of delinquent premiums, reassume that risk no matter to what extent the hazard of death had increased. If such construction were correct, there would be no purpose in the Company including the condition regarding the requirement of evidence of insurability in order to effect a reinstatement.

In its opinion the Court states:

"The company made no claim that Schiel had become uninsurable for ordinary life purposes in the amount originally written; in fact it conceded by its conduct that he was insurable for those purposes and in that amount. It declined, however, to reinstate the ordinary life policy except upon a

condition importing a concept of insurability at variance with the policy as written. This, we think it might not do."

We believe that the above quoted statement was prompted by the decision of the Supreme Court of Illinois in *Kahn v. Continental Casualty Company*, 391 Ill. 445, 63 N.E.2d 468. In that case the insurance company refused to reinstate except upon condition that the benefits of the policy be reduced or that insured make like reductions in similar policies which insured had subsequently taken out. The court pointed out that the company at all times had treated the insured as insurable and that the company conceded insurability by offering to reinstate the policy *in its original form* on condition that insured would reduce or cancel his other insurance.

In the case at bar appellee did not concede insurability. At no time did it offer to reinstate the policy *in its original form*. The condition which it imposed was the exclusion of insurance coverage during participation of insured in aviation. The effect of appellee's offer was a rejection of the application to reinstate the policy in its original form and an offer to issue what would amount to a different contract.

Insured's participation in aviation was a factor which appellee considered at the time the policy was issued. It appeared from the original application that insured did not intend to engage in such activity. It is true that after the policy was issued (and prior to lapse) insured was free to engage in any activity whatsoever without jeopardizing his insurance, but after lapse insurer had no obligation to reinstate upon a consideration of insurability any different from that which it had originally applied. If the original application

had disclosed insured's intention to engage in aviation and the application for reinstatement likewise showed such intent and if appellee had refused to reinstate except upon inclusion of the aviation clause, then the following language of the Court would have been applicable:

“It (appellee) declined, however, to reinstate the ordinary life policy except upon a condition importing a concept of insurability at variance with the policy as written” —

at variance with the concept of insurability adopted by appellee in writing the policy. The same can be said if the original application showed that insured was suffering from tuberculosis and the application for reinstatement showed the same condition. An offer to reinstate upon condition that death from tuberculosis be eliminated as a risk, would import a concept of insurability at variance with the underwriting practice of the company. No one would suggest, however, that such condition would import a concept of insurability at variance with the policy as written if the tubercular condition was not shown to exist at the time of the original application.

We submit that the concept of insurability as disclosed by the policy and insurer's practice in passing upon risks includes the principle that active participation in aviation precludes insurability under an unlimited contract.

We have not undertaken an analysis of all decisions dealing with “insurability” in reinstatement clauses for the reason that the Court appears to have reached its conclusion solely upon the basis of the inclusion of the so-called “occupation clause.” We have seen that the so-called “occupation clause” has to do with insur-

ance coverage not insurability. If the decision of this Court is to stand it must be bottomed upon the *Sussex* rule, i.e. that "insurability" is not more comprehensive than the term "good health." That rule does not prevail in Arizona.

We respectfully submit that this case is governed by the Arizona law as announced in the *Pettid* case and applied to a substantially identical situation by the Missouri court in the *Kirby* case. We summarize our position:

(a) Upon application for reinstatement, appellee had the right to inquire into all matters which it took into consideration when issuing the original policy;

(b) At the time the policy was originally issued, appellee inquired as to the insured's intention with respect to participation in aviation;

(c) Appellee made the same inquiry upon application for reinstatement and learned that the hazard of death had been increased by reason of insured's intention to engage in military aviation;

(d) Appellee refused to reinstate the policy in its original form. This constituted a rejection of the application for reinstatement;

(e) Appellee offered to reinstate the policy in modified form—with risk of aviation death excluded;

(f) Insured accepted appellee's offer and reinstatement of the modified policy was effected;

(g) As appellee had the right to reject the application for reinstatement it conclusively follows that it had the right to offer reinstatement of a

modified contract (in effect a new contract) in any form that it desired.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing be granted and that judgment of the lower court be, upon further consideration, affirmed.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES

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CERTIFICATE OF COUNSEL

I, counsel for the above named appellee, do hereby certify that in my judgment the foregoing Petition for Rehearing of this cause is well founded and that it is not interposed for delay.

JOSEPH S. JENCKES, JR.

253
No. 12251

United States
Court of Appeals
For the Ninth Circuit.

TOM CLARK, as Attorney General of the United
States, et al.,

Appellants,

vs.

TADAYASU ABO, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
DEC 22 1948

PAUL P. O'BRIEN,
CLERK

No. 12251

United States
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In the Southern Division of the United States
District Court, for the Northern District of
California

25294S

TADAYASU ABO, et al.,—adults, individually,
and as constituting a class, and as representa-
tives of a class,

and

GENSHYO AMBO, et al.,—minors, individually,
and constituting a class, and as representatives
of a class, by HARRY UCHIDA as the next
of friend and as guardian ad litem of them and
each of them,

Plaintiffs,

vs.

TOM CLARK, as Attorney General of the United
States; FRANK J. HENNESSY, as United
States Attorney for the Northern District of
California, and, as such, the head of the United
States Department of Justice in said District;
JAMES F. BYRNES, as the Secretary of
State; FRED VINSON, as the Secretary of
the Treasury; UGO CARUSI, as the Commis-
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as the District Director of the United States
Immigration and Naturalization Service,
United States Department of Justice, and, as
such, the head of the United States Immigra-
tion and Naturalization Service for the

Northern District of California; JAMES E. MARKHAM, as the Alien Property Custodian; HAROLD ICKES, as Secretary of the Interior; DILLON S. MYER, as Director, War Relocation Authority; RAYMOND R. BEST, as Project Director, Tule Lake Center; and IVAN WILLIAMS, as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California,
Defendants.

COMPLAINT TO RESCIND RENUNCIATIONS
OF NATIONALITY, TO DECLARE NA-
TIONALITY, FOR DECLARATORY JUDG-
MENT AND FOR INJUNCTION

Comes each of the plaintiffs above named complaining of the defendants above named and for cause of action alleges:

I.

This suit arises under the laws and the constitution of the United States and particularly under the provisions of the 14th Amendment of the Constitution and the provisions of Title 8 USCA, sec. 601(a), and Title 8 USCA, sec. 903, and Title 28 USCA, sec. 400, and this court has original jurisdiction to entertain the suit by virtue of the provisions of Title 28 USCA, sec. 41(1), Title 8 USCA, sec. 903, and Title 28 USCA, sec. 400. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars as to each plaintiff.

II.

That defendant Tom Clark is and at all times herein mentioned was the duly appointed, acting and qualified Attorney General of the United States; that defendant Frank J. Hennessy is and at all times herein mentioned was the duly appointed, acting and qualified United States Attorney of the Northern District of California, and as such is the head of the U. S. Department of Justice in said district; that defendant James F. Byrnes is and at all times herein mentioned was the duly appointed, acting and qualified Secretary of State; that defendant Fred Vinson is and at all times herein mentioned was the duly appointed, acting and qualified Secretary of Treasury; that defendant Ugo Carusi is and at all times herein mentioned was the duly appointed, acting and qualified Commissioner of the United States Immigration and Naturalization Service; that defendant Irving M. Wixon is and at all times herein mentioned was the duly appointed, acting and qualified District Director of and head of the United States Immigration and Naturalization Service, U. S. Department of Justice, for the Northern District of California; that at all of said times and now the following defendants were and are as follows: James E. Markham, the Alien Property Custodian; Harold Ickes, the Secretary of the Interior; Dillon S. Myer, the Director, War Relocation Authority; Raymond R. Best, the Project Director, Tule Lake Center; and the defendant Ivan Williams, the duly appointed, acting and qualified Officer in Charge, United States

Department of Justice, Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California.

III.

Each plaintiff is a person having Japanese ancestry, and at all times herein mentioned has been domiciled in and a resident of the United States, a native-born American, a citizen and national of the United States and subject to the jurisdiction thereof, as provided by the 14th Amendment of the Constitution, the provisions of Title 8 U. S. Code, sec. 601(a), and as defined in Title 8 U. S. Code, sec. 501(a) and 501(b); none of the plaintiffs at any time whatever has been and none is an alien enemy and none at any time has been an alien; none at any time has been and none is a native, citizen, denizen or subject of Japan or of any hostile nation, government or country; none has at any time been and none is a danger to the public peace or safety and none has at any time been accorded a judicial hearing upon any charge or accusation that he or she was or is such a danger and, on the contrary the Department of Justice, in 1945, made a finding and declaration that each plaintiff was not hostile to and was not a danger to the public peace or safety; each plaintiff at all times herein mentioned and ever since his or her said birth in this country has been and now is loyal and devoted to the United States; and, by virtue of the circumstances hereinafter set forth, each is a resident within the jurisdiction of this Court.

IV.

That plaintiffs jointly and severally bring and maintain this proceeding under the procedure and practice conforming to the practice in actions at law or suits in equity and pursuant to the provisions of Rules 1, 20, 23(1), 23(2), 23(3), 18(a), 18(b), 19(a) and 19(b) of the Rules of Civil Procedure for the District Courts of the United States, uniting and joining in this single petition for the following reasons and purpose, among others, to-wit: (1) For the convenience and interest of the plaintiffs and defendants; (2) to promote the orderly, convenient and efficient administration of justice; (3) to avoid and prevent a multiplicity of suits; (4) because plaintiffs jointly and severally assert rights to release and discharge from the unlawful internment and detention in which they are held and because their rights thereto arise out of the same series of occurrences; (5) because there are several points of litigation and questions of law and of fact arising in said proceeding that are common to each and all of them; (6) because said proceeding is also a class action and the character of the rights sought to be enforced for the persons and class of persons on whose behalf the same is brought and those who hereafter may be joined as plaintiffs herein is joint, common, and several; and (7) because there are common questions of fact and of law affecting the several rights involved and a common relief is sought by each plaintiff against defendants.

The questions and issues of fact involved herein

which are common to each and all of plaintiffs are: (1) Whether the plaintiffs are native-born American citizens and nationals of the United States or stateless persons or alien enemies, it being apparent that if plaintiffs are not alien enemies their internment was and is unlawful and they are entitled to immediate release therefrom, such internment and detention lawfully being applicable only to alien enemies during the actual period of time in which the United States is engaged in the prosecution of war and then only provided the internment and detention of specified alien enemies is commanded by the President of the United States and his authority so to do is invoked under and arises from the Alien Enemy Act; and (2) whether the renunciations of nationality signed by plaintiffs are void and invalid as having been signed under duress, menace, fraud and undue influence, as hereinafter alleged, and as having been rescinded, the political status of the plaintiffs depending upon a determination of the legality or illegality thereof;

Among the questions of law involved herein, which are common to each and all of the plaintiffs herein, are the following, to-wit: (1) The constitutionality and validity of Title 8 USCA sec. 801(i), and the nationality regulations adopted pursuant thereto, on their face and as construed and applied to plaintiffs who contend the same are unconstitutional and void for being repugnant to the provisions of the 4th, 5th, 6th, 8th, 9th, 10th, 13th and 14th Amendments of the Constitution and to the

following provisions of the Constitution, viz., Article I, sec. 1; sec. 8 subd. 4; sec. 9, subd. 3; Article III, sec. 1, and sec. 3 subds. 1 and 2; and Article IV, sec. 2 subd. 1; and (2) whether the Alien Enemy Act, Title 50 USCA, secs. 21 and 22, which defendants assert was invoked against plaintiffs and under which defendants assert plaintiffs were and are interned as alien enemies, was lawfully invoked against them and was and is lawfully applied to them, and the constitutionality and validity of said Alien Enemy Act on its face and also as construed and applied to the plaintiffs who contend the said Act was unlawfully invoked against them and was and is unlawfully applied to them and also that it is unconstitutional and void on its face and as construed and applied to them for being repugnant to each of the aforementioned amendments and provisions of the Constitution.

V.

Each plaintiff, contrary to his or her will and desire, is unlawfully interned, detained for the purpose of an involuntary removal or deportation to Japan and restrained of his or her liberty by the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, situated within the jurisdiction of this Court, at Newell, Modoc County, California, said Officer in Charge acting under the order or orders of the Attorney General of the United States and presently being one, Ivan Williams, defendant herein; and the said Attorney General and

said Officer in Charge, acting under his order or orders, has announced and given notice of intention summarily to remove and deport each plaintiff involuntarily to Japan;

The United States Department of Justice has publicly announced the early closing of the said Tule Lake Center where persons of Japanese descent and the plaintiffs, as such, heretofore, have been and now are detained by the Government, and has ordered each plaintiff and all other persons of like ancestry, there interned, who have signed applications for renunciation of U. S. nationality, upon a mere notice of approval thereof being given by an Assistant Attorney General of the Department of Justice, detained and restrained of his or her liberty for deportation purposes and has publicly announced that commencing on and after November 15, 1945, each plaintiff and all persons who have signed such renunciation applications will be forcibly removed and deported to Japan, and that plaintiffs and all such persons so scheduled for such removal and deportation to Japan will be so deported without any notice being given and without any hearings being accorded any of them thereon;

Said Officer in Charge at the Tule Lake Center, the defendant Ivan Williams, acting under the orders of the Attorney General of the United States, under a claim of color of authority of the Alien Enemy Act, Title 50 USCA, sec. 21, asserts each of said plaintiffs is an alien enemy and that as such

each has been and is interned and restrained of his or her liberty and is held and scheduled for such an involuntary removal or deportation thereunder to Japan, albeit that such assertion that plaintiffs are alien enemies or that any of them is an alien enemy is a false and fictitious assertion, claim and assumption wholly unsupported by fact and by law and is a gross mistake and error of fact and of law.

VI.

Each plaintiff for a long period of time has been and now is interned and detained at said Tule Lake Center and now is under an order of removal or deportation to Japan, as each is informed and believes and therefore alleges, by reason of a claim that each, by a renunciation of United States nationality, thereby became an alien enemy and subject to such internment, detention and removal or deportation under the provisions of the Alien Enemy Act, Title 50 USCA, sec. 21, the facts out of which such claim arises being as follows:

Each plaintiff has had, in his or her ancestral line, an unknown number of ancestors who, at some remote time in the past, were born in a geographical area over which a Japanese sovereign ruled and over whom such sovereign claimed, asserted and enforced through the then instrumentalities of police power, a temporal jurisdiction. Solely because of said type of ancestry each plaintiff, pursuant to proclamations, commands and orders of General John L. DeWitt, then Commander of the Western

Defense Command and Fourth Army, during the year 1942, first was imprisoned in the immediate vicinity of his or her then home, situated within the geographical area embraced by the Western Defense Command, then driven into and imprisoned in stockades called Assembly Centers, thereafter transported to concentration camps called War Relocation Centers and there confined for approximately three years, and thereafter imprisoned in the Tule Lake Center, Newell, Modoc County, California, said imprisonment having been continuous from 1942 to date, all without a charge of crime or accusation of crime having been lodged against any of them, and without any hearing having been given them on the reasons for such treatment and in spite of the fact that the Attorney General of the United States in 1945 caused each to be notified that he or she had been found to be a person not dangerous to the security of the United States;

That during the entire period of his or her unlawful imprisonment, commencing in 1942, and continuing ever since, as aforesaid, each plaintiff has been and still is deprived of substantially all his or her rights, liberties, privileges and immunities guaranteed by the Constitution to him or her as a native-born citizen and national of the United States and subject to the jurisdiction thereof, as also those guaranteed to him or her as a person thereunder, said deprivations having been committed by governmental authorities under a claim of color of authority of the United States;

During the preceding period of 1945, at said Tule Lake Center, each plaintiff signed an application for renunciation of United States nationality, as provided for by Title 8, USCA, sec. 801(i), and the Rules and Regulations adopted by the Department of Justice under the Nationality Act of 1940, as amended, said Rules being more particularly designated as Sections 316.1 to 316.9, inclusive, of Chapter I, sub-chapter D, part D, of Nationality Regulations; that none of said applications has been approved by the Attorney General of the United States, nor has he ever issued an order approving any of them, as is required by Title 8 USCA, sec. 801(i) and Rule 316.7 of the Nationality Regulations, before such becomes effective; that each plaintiff has received a letter from a representative of the Department of Justice stating that his or her renunciation has been approved by the Attorney General as not contrary to the interests of the national defense, and informing each that he or she no longer is a citizen of the United States and is not entitled to any of the rights and privileges of such citizenship;

The signing of said applications for renunciation was neither under oath nor real nor free nor voluntary on the part of any of said plaintiffs but was caused by and was the result of duress, menace, fraud, undue influence, mistakes of fact and of law and was the product of the fear, coercion and intimidation under which each then and there was held and subjected to and under which he or she labored, all as hereinafter set forth;

In signing said renunciation applications, none of the plaintiffs was informed, knew, intended or expected, by reason thereof to be interned, detained and restrained of his or her liberty as an "alien enemy" or otherwise, and none was informed, knew, intended, or expected that he or she would be involuntarily removed or deported to Japan by reason thereof and, on the contrary, was led to believe by the Government, its agents, servants and employees, that the signing thereof was not final, but tentative, and subject to being rescinded and revoked.

VII.

The internment and detention of each plaintiff and the restraint upon the liberty of each, as aforesaid, and the threatened, imminent and impending involuntary removal and deportation of each to Japan, as aforesaid, are, and each of said things, is, in violation of the Constitution and laws of the United States, as heretofore stated, and deprives each of the due process of law guaranteed by the 5th Amendment of the Constitution, in the following particulars, to-wit:

A: The unconstitutionality and illegality of the internment and detention of each plaintiff and the restraint upon his or her liberty;

(1) That none of the applications for renunciation of nationality signed by plaintiffs has at any time whatsoever been approved by the Attorney General of the United States nor has an approval nor an order approving any of the said applications at any time been made by him nor has he at

any time passed upon or considered any of them as required by the provisions of Title 8 USCA, sec. 801(i), and by the provisions of secs. 316.1 to 316.9, inclusive, of Part 316, sub-chapter D, Chapter I of Nationality Regulations, before a renunciation therein provided for becomes effective;

(2) That at the time each plaintiff signed said renunciation application the United States was engaged in the prosecution of a war and, by reason thereof, any approval of a renunciation of nationality by any of the plaintiffs necessarily would have been contrary to the interests of national defense and to the sovereignty of the United States and violative of the provisions of Article III, section 3, subdiv. 1 of the Constitution;

(3) That the hearing accorded each plaintiff upon his or her application for renunciation was nothing but a perfunctory pseudo-hearing or command appearance before a hearing officer designated by the then Attorney General of the United States and was wanting in each and all of the elements of a fair and impartial hearing, and in the incidents thereof, in that each plaintiff was deprived of the benefits of independent advice and counsel and of the assistance of counsel in and about said hearing, was denied the right to be confronted by any evidence and to examine witnesses against him or her or to produce witnesses in his or her behalf, albeit none of the plaintiffs waived his or her rights thereto; that at each such pseudo-hearing, the hearing officer's recommendation on each application

was based, either in whole or in part, upon secret information and data available to and used by the hearing officer but which was withheld, concealed and kept secret from each plaintiff, as provided by the provisions of Section 316.6 of the Nationality Regulations of the Department of Justice, and any approval thereof, had any approval or order approving any of said renunciations been issued or made by the Attorney General of the United States, necessarily would have been based wholly or partially thereon;

(4) The provisions of Title 8 USCA, sec. 801(i), are unconstitutional and void for uncertainty and also for containing an improper delegation of legislative and judicial powers to the Attorney General of the United States, in violation of the provisions of Article I, sec. 1, and Article III, sec. 1, of the Constitution.

B: The Unconstitutionality and Illegality of the Removal and Deportation of Each of Plaintiffs:

(1) None of the plaintiffs is an alien enemy within the intent, meaning and purview of the provisions of Title 50 USCA, sec. 21, as aforesaid;

(2) No warrant for the deportation of any of the plaintiffs has at any time issued from the President of the United States or from any court, judge or justice, as is a prerequisite to involuntary removal or deportation under Title 50 USCA, sec. 24;

(3) No complaint at any time whatever has been filed against any of the plaintiffs, as required by

Title 50 USCA, sec. 23, nor has any of the plaintiffs ever had a judicial hearing on such removal or deportation, in any court of competent jurisdiction, nor has any such court at any time issued any order of removal or deportation against any of the plaintiffs, all of which are jurisdictional prerequisites to removal or deportation in involuntary removal or deportation proceedings under the said Alien Enemy Act;

(4) That none of the plaintiffs has been allowed a reasonable period of time consistent with the public safety and according to the dictates of humanity and national hospitality within which to recover, dispose of and remove his or her goods and effects and prepare for his or her departure, all as required by Title 50 USCA, sec. 22, in involuntary removal or deportation proceedings under the said Alien Enemy Act;

(5) None of the plaintiffs has been accorded and none will be accorded any hearing with respect to his or her said involuntary removal and deportation to Japan but summarily will be removed and deported, as aforesaid, and in such summary removal and deportation en masse without any hearing having been given or intended to be given to plaintiffs and each of them thereon prior thereto the defendants and the United States Department of Justice have grossly discriminated against and do still continue to discriminate against them and each of them in that defendants and said Department of Justice heretofore have followed the practice and policy and now do follow the practice and policy of grant-

ing individual prior hearings in similar removal and deportation proceedings to all persons of German and Italian nationality whom the defendants and said Department of Justice have sought to remove and deport and are seeking to remove and deport under the provisions of the Alien Enemy Act; and said discriminatory treatment meted to plaintiffs and each of them denies them and each of them the equal protection of the laws and deprives them and each of them of the due process of law guaranteed them and each of them by the 5th Amendment of the Constitution;

(6) That neither a declared nor an undeclared war now exists between the United States and any foreign nation or government; that no invasion or predatory incursion is being perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government; that the United States is now at peace with the world;

VIII.

That the defendants, and each of them, at all times herein mentioned have treated and have threatened to treat and still treat and threaten to treat and will continue to treat the plaintiffs, and each of them, as alien enemies; that defendants and each of them have threatened and still threaten to remove and deport plaintiffs and each of them involuntarily and against their consent and desire from the United States to Japan and they and each of them will so do unless restrained and enjoined from so doing by order of this Court; and plaintiffs

and each of them are informed and believe and therefore allege that the defendants and each of them threaten to and, unless restrained and enjoined from so doing by this Court, will remove plaintiffs and each of them from the jurisdiction of this court into parts of the United States unknown to them in preparation for said deportations to Japan; and plaintiffs are informed and believe and therefore allege that unless restrained and enjoined by order of this court, the defendants will commence their deportations of plaintiffs on or about November 15, 1945.

Wherefore, plaintiffs pray for a temporary restraining order, for an injunction pending suit and for judgment.

As and for a Second and Separate Cause of
Action, Plaintiffs Allege:

I.

Plaintiffs incorporate herein paragraphs I to VI, inclusive, and paragraphs VII B (5) and VIII of their first Cause of Action, as if fully set forth in this cause of action.

II.

(1) The signing of the renunciation applications by each plaintiff was neither under oath nor real nor free nor voluntary, but was caused by and was the result of duress, menace, fraud, undue influence, mistakes of fact and of law and was the product of fear, coercion and intimidation under which each then and there was held and subjected to by the

government and by group and gangs, and by individuals, as hereinafter set forth:

(a) Commencing with their unwarranted and unjustified evacuation from their homes in 1942, as aforesaid, and continuously since then to date, the United States government, acting by and through its agents, servants and employees, and as the jailor, custodian and guardian of plaintiffs, its wards, has discriminated and still discriminates against the plaintiffs and each of them simply because of their descent from persons of Japanese origin, and, ever since their unlawful imprisonment in the vicinity of their homes immediately preceding their said evacuation and continuously thereafter during their imprisonment in concentration camps and during their internment in the Tule Lake Center, has unlawfully confined them and members of their families and subjected them and members of their families there confined to governmental duress, menace, fraud and undue influence and harassment and held and still holds them in a continual mental state of fear and terror simply because of their Japanese ancestry; the United States government, pursuant to its said policy and program of discrimination and in furtherance thereof, steadily and systematically has subjected them to a course of abusive treatment during said period of time; pursuant to said policy and program it has, by said continuous imprisonment without according them or any of them a hearing on the reasons therefor, regarded, classed and treated them as though

they were alien enemies; all the males among them of draft age, including the many who have served faithfully in our armed forces and hold honorable discharges therefrom, the many others who were transferred to and now are in the enlisted reserve and subject to being called for active duty and the many who repeatedly have volunteered to enlist in the Army but were refused and denied the right to serve and to fight for and defend this country by prejudiced and hostile draft boards and by draft boards denying them such rights upon governmental orders and who are still denied this birthright, were classified "4-C" under the Selective Training and Service Act of 1940, that is, as "alien enemies," by draft boards acting upon governmental orders, without good cause and without justification and in violation of their rights as American citizens, simply because they were of Japanese descent; by reason whereof, plaintiffs and all of said persons of like descent likewise confined to said Center were led to believe and feared and had good cause to believe and fear that the Government of the United States viewed them as alien enemies and desired and intended to deprive them of the right to remain in and to fight for this country and to imprison them for an indefinite period of time and thereafter to remove and banish them and their families and all like descended persons from the United States; that the government, after having encompassed their ruin by the aforesaid evacuation and their subsequent continuous confinement, led plaintiffs to

believe that the alien Japanese members of their families were scheduled and held for removal and deportation to Japan and that the citizen members of said families would be detained in this country and thereby caused alien parents, who feared the splitting of their families, to coerce their citizen children into signing renunciation applications, and led plaintiffs to believe that the signing of said applications was a matter commanded by the Government, compliance with which was a prerequisite to their right and that of their families to remain in the protective security of said Center and to prevent a disuniting of their families and to save themselves and their families from physical harm and violence were they to be released and sent back into civil life in communities where hostility to persons of Japanese ancestry reigned and where they feared they would suffer great physical harm and probable loss of life from lawless elements; and the government very recently has initiated the practice of permitting aliens to leave said Center and return to their former homes while it holds their children who have signed said renunciation applications for involuntary removal and deportation to Japan and now also compels those who have been released from confinement and those who were lucky enough to have escaped it altogether, including those of our soldiers of Japanese ancestry returning from the battlefields of Europe and the Pacific who have parents, wives, sisters, brothers or children interned in said Center and scheduled for deportation to Japan, to the choice of an involun-

tary banishment from the United States to accompany them to preserve family unity or to remain here separated from them; that the signing of said applications and the pseudo-hearing held thereon was a trap designed by the Government of the United States to cause and result in the involuntary deportation of each signer to Japan and of the involuntary removal of members of his or her family to Japan and thus to result in a mass banishment of persons of Japanese descent from the United States, which design and purpose, at all times heretofore was withheld, concealed and kept secret from the signers and plaintiffs; and, by reason of said governmental duress, menace, fraud, and undue influence, and the threats, coercion and intimidation practiced upon each plaintiff and members of his or her family each plaintiff was compelled by the government to sign a fictitious renunciation of a citizenship of which each already, in fact, had been deprived by the Government of the United States;

(b) That neither at the time each plaintiff signed an application for renunciation at the pseudo-hearing held thereon at said Center nor at any time prior thereto during his or her unlawful confinement, was he or she a free agent in any sense of the words but then and there was unlawfully confined and restrained of his or her liberty and was held in duress by the United States government, its agents, servants and employees, as the jailor, custodian and guardian of plaintiffs, its wards, and by it and its agents, servants, and em-

ployees, knowingly was permitted to be exposed and subjected to the duress, menace, fraud and undue influence practiced upon and against each plaintiff by organized terroristic groups and gangs of persons, likewise there confined, who were fanatically pro-Japanese and committed to forsaking this country and who were engaged in and allowed to engage in a continuous campaign to engender, develop and promote loyalty to Japan among the internees;

That said groups and gangs there were engaged in and were permitted to engage in a generalized campaign of lawlessness prior to the time said renunciation hearings were held and at the time of said hearings had established and then and thereafter maintained a veritable rule and reign of terror over plaintiffs, their families and internees residing in said Center; they preached and practiced sedition; they endeavored, by all means at their command, to proselyte to the cause of the enemy the plaintiffs, their families and other loyal internees there residing; they actively engaged in the engendering, development and promotion of loyalty to the cause of Japan which they openly and notoriously espoused; they informed plaintiffs that plaintiffs and their families were regarded by the United States government as alien enemies and that it had scheduled them and their families for deportation to Japan; they informed plaintiffs and internees at said Center that innumerable acts of physical violence had occurred to persons who had

been relocated in civil life and that their lives would be in jeopardy, because of community hostility, if any succeeded in being returned to civil life in this country; they threatened the plaintiffs and internees that if any of them talked to, communicated with or associated with any of the Caucasians in and about said Center those so doing would be assaulted by goon-squads, gangsters and hoodlums sponsored and commanded by them; they sent in spurious letters to the Department of Justice requesting applications be forwarded to internees whose names they signed to such letters and then informed the receivers that the government demanded that each receiver sign it; they maintained and operated schools in said Center to coach the victims of their fraud, menace, deceit and undue influence into giving false and untrue answers to questions the hearing officers were to propound to them at the hearings on renunciation applications; they informed plaintiffs, as did governmental announcements publicly made just prior to the time said hearings were held in 1945, that the deportation of each plaintiff and that of alien members of his or her family, on an exchange ship, was imminent and pending, and said groups and gangs informed and threatened each plaintiff that he or she would be deported in any event and that if he or she failed to sign an application for renunciation the security of each and that of their families upon arrival in Japan would be endangered because the pro-Japanese leaders of said nationalistic pressure groups and gangs would report them to the Japa-

nese government as being dangerous alien enemies to Japan and as American spies and that they would there be seized and punished as such; they maintained an elaborate system of black-listing and espionage over the internees in said Center; that said groups and gangs threatened, coerced and intimidated plaintiffs into signing said renunciation applications by means of threats, displays, shows, exhibitions and demonstrations of force and violence and by threats against their lives and by threats of inflicting great physical injury upon them and upon members of their families in the event he or she failed to obey their mandates and to sign such renunciation applications and thereby compelled each of them to sign such renunciation application; that each plaintiff believed in and feared and had good cause and reason to fear that said threats would be carried into execution and that he or she and his or her family would be exposed to physical violence and probably loss of life if he or she failed to heed said threats and failed to obey the mandates of said pressure groups and gangs and thereby was compelled to sign such renunciation application; that by reason of said rule of terror prevailing over said Center which, together with the failure of the government to take steps to prevent, halt and put a stop thereto and to accord them protection against the same, and by reason of the duress practiced by the Government against them, as aforesaid, the plaintiffs and other internees in said Center were kept in a constant state of fear, fright, mass hysteria and terror and, by reason

thereof, and because of the absence of protection against the terroristic activities of said groups and gangs being afforded by the government which was their due many loyal and innocent internees were driven into becoming nominal but inactive members of such groups simply to save themselves and their families from danger, physical violence and probable loss of life from such sources, and plaintiffs were compelled involuntarily to sign said renunciation applications by reason thereof;

That at all times during said rule and reign of terror imposed upon the internees in said Center the United States government, and its agents, servants and employees, were aware of and knew of the purposes and activities of said groups and gangs and of the duress, menace, fraud and undue influence said groups and gangs practiced upon and against plaintiffs, members of their families and other internees in said Center, but condoned the same and was responsible for, and actually aided and abetted the same by permitting such activities and by failing to prevent and to stop the same and by failing to arrest and prosecute the leaders and active members thereof and to put a stop to their criminal activities and lawlessness and by failing to invoke the federal sedition and espionage laws or other criminal laws against them and by failing to segregate such criminal elements from the plaintiffs and other loyal internees and to isolate them;

By reason of the duress, menace, fraud and undue influence practiced and exerted upon and against each plaintiff by the government and by

the groups and gangs, as aforesaid, and the failure of the government to accord them the protection against the aforesaid lawless acts of said groups and gangs, the plaintiffs were caught in the grip of terror which ruled throughout said Center and the wave of terror that engulfed them when they and members of their families were confronted with a possible return to face hostility in the communities from which they had been excluded and driven by the 1942 imprisonment program which was termed an evacuation and was initiated by civilian exclusion orders issued by General John L. DeWitt, as aforesaid;

That none of said renunciations was real, free or voluntary on the part of any of plaintiffs, but each was the product of fear, torment and terror induced in each plaintiff's mind by virtue of the duress, menace, fraud and undue influence to which each was subjected by the government and by the groups, gangs and individuals, as aforesaid, all of which operated to deprive and did deprive each plaintiff of freedom of choice, will and desire in and about the signing of such applications for renunciation and each of said renunciations was and is false, fictitious, null and void by reason thereof;

(2) Prior to the time of the filing of this complaint each plaintiff, twice in writing, notified the Attorney General of the United States, his agents and representatives, and the defendants, of the circumstances under which he or she signed such renunciation application, and that he or she with-

drew, retracted, rescinded, revoked, cancelled and annulled his or her said application for renunciation of United States nationality for the reasons that the same was signed under duress, menace, fraud, undue influence and mistakes of fact and of law, as aforesaid, and informed him and them of the grounds and reasons on which said rescission and revocation was based and made but said Attorney General failed and still does fail to accept said rescission and revocation; that in each of said written notifications sent to the Attorney General of the United States each of said plaintiffs demanded of him and them and of defendant, Ivan Williams, as the aforesaid Officer in Charge at said Tule Lake Center, that he or she be released and discharged from said internment, detention and unlawful restraint upon his or her liberty, asserting therein the various grounds and reasons therefor, both factual and legal, but the Attorney General of the United States, his agents and representatives, and Ivan Williams, as the Officer in Charge of said Tule Lake Center, as aforesaid, acting under his orders, and said defendants, failed and refused and *to* still fail and refuse to release and discharge each and all of said plaintiffs from said internment, detention and restraint and threatened removal or deportation to Japan; that a copy of the last written demand so made by each plaintiff on November 1, 1945, by registered air-mail letter, is annexed hereto, incorporated herein, made a part hereof, and is marked Exhibit "1".

As and for a Third and Separate Cause of Action,
Plaintiffs Above Named as Minors Allege:

I.

Plaintiffs incorporate herein Paragraphs I, II, III, IV and VI of said complaint as if fully set forth in this cause of action.

II.

That all of the plaintiffs named in this cause of action were under the age of twenty-one (21) years at the time of signing of said renunciation applications, said plaintiffs including the minors above-named appearing by next of friend and guardian ad litem and many other plaintiffs who since said time have attained their majority; and by reason of the minority of said plaintiffs at the time of signing said renunciation applications and also by reason of the aforesaid rescissions and disaffirmances by them and each of them said alleged renunciations are of no legal effect whatsoever and said plaintiffs are still citizens and nationals of the United States and are not subject to internment, detention, restraint and deportation to any foreign country.

Wherefore, the plaintiffs, and each of them, pray for a temporary restraining order and for an injunction pendente lite and for a permanent injunction prohibiting defendants, and each of them, their agents, servants, employees and representatives, and each of them, from removing the plaintiffs, or any of them, from the jurisdiction of this court and from removing or deporting them or any of them

from the United States to Japan or to any foreign country, or from taking any steps in furtherance of any such removal or deportation, pending the final judgment in this suit; and each plaintiff prays that his or her said application for renunciation of United States nationality be ordered to be delivered up and cancelled and be declared null, void and of no effect; that any approval thereof made by the defendant Attorney General of the United States or order issued by him approving the same, if any ever was made, be cancelled and be declared null, void and of no effect; that it be declared and adjudged that he or she is not an alien enemy; that he or she be declared to be a national of the United States and a citizen thereof; that it be adjudged and decreed that he or she is a native-born citizen and national of the United States; that it be adjudged and decreed that his or her internment, detention and restraint is illegal and void and that each be ordered released therefrom; that any and all orders for his or her removal or deportation be ordered cancelled; for an order and judgment declaring his or her rights in the premises; that each have his or her costs of suit; and that each have such other and further relief as may be just.

Dated: November 5, 1945.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

United States of America,
State of California,
County of Modoc—ss.

Harry Uchida, being first duly sworn, deposes and says: That he is one of the plaintiffs in the

foregoing complaint named; that he is confined and detained at the Tule Lake Center, Newell, Modoc County, California, as alleged therein; that he makes this affidavit and verification of said complaint on his own behalf as such a plaintiff and on behalf of each and all the plaintiffs in said complaint, each of whom likewise is confined and detained at said Tule Lake Center by defendants, as alleged therein, and each of whom has authorized him so to do, and because it is impracticable to have the same verified by each of them by reason of the aforesaid confinement and detention of each, their large number and the long period of time which would be required and be consumed to have such done and because of the shortness of time due to the threatened and imminent involuntary removal and deportation of each and all of said plaintiffs, as alleged therein; that he personally knows the facts set forth in said complaint which apply equally to each and all of said plaintiffs; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ HARRY UCHIDA.

Subscribed and Sworn to before me this 7th day of November, 1945.

[Seal] /s/ JOE J. THOMAS,

Notary Public in and for the County of Modoc,
State of California.

My Commission Expires September 20, 1949.

EXHIBIT NO. 1

San Francisco, California.

November 1, 1945

Honorable Tom Clark,
Attorney General of the U. S.,
Department of Justice Building,
Washington, D. C.

Dear Sir:

Each of the persons whose name appears on the attached list, hereinafter referred to as the renunciant for the sake of clarity, at all times herein mentioned has been and now is interned in the Tule Lake Center situated in the vicinity of Newell, Modoc County, California. Ostensibly each of said persons there is confined as an asserted renunciant of United States nationality. Under a claim of color of authority under the Alien Enemy Act, 50 U. S. Code, sec. 21 et seq., each of them is classed, treated and detained as an alien enemy in said prison, concentration or internment camp by you or under your authority. The reason for this continued and oppressive imprisonment of said persons appears to be that at a perfunctory appearance before a government official, representative or hearing officer, presumably designated as such by the then Attorney General of the United States, each of the said persons, in the early part of 1945, signed an application for renunciation of United States nationality on a form prescribed and supplied by the Department of Justice.

The signing of said renunciation forms was not under oath. It was neither real, free nor voluntary on the part of any of the said persons but was obtained through duress, menace, fraud, undue influence and mistake of fact and of law, and through the means of each of said things, all as you heretofore have been informed by each of said person's recent letter to you revoking such renunciation.

Each of the said persons has received a letter from a representative of your Department which contains a notice stating, in substance, that said renunciation has been approved by the Attorney General as not contrary to the interests of national defense and that the signer of said renunciation form no longer is a citizen of the United States and is not entitled to any of the rights and privileges of such citizenship. Each of such letters, however, fails to specify the date, when, if ever, the Attorney General himself approved the renunciation and also fails to state that an order, at any specified time or ever, actually was issued by him approving the renunciation as not contrary to the interest of national defense. It is significant that an approval of a renunciation is a finding that a renunciant is not a danger to our security. It is strange that many of such applications were revoked by the signers prior to the time any attempted approval thereof was made and that the revoking letters were ignored by your Department.

The theory offered in justification of such internment, if I am correctly informed, is that an

approved renunciation, provided it was executed and approved during time of war and possessed the attributes of constitutionality and legality, automatically converted the renunciant into an alien enemy and thereupon condemned him to internment as an alien enemy under the provisions of the Alien Enemy Act. The theory is novel and unprecedented to say the least. The most that can be said of such a renunciation is that a shedding of U. S. citizenship does not clothe the renunciant with foreign citizenship but leaves him stateless. Such a person, nevertheless, is an inhabitant of this country and is entitled to the protection of constitutional safeguards. There is neither constitutional nor statutory authority or precedent justifying the internment of such a person as an alien enemy under the provisions of the Alien Enemy Act.

None of the persons whose name appears on the attached list is an alien enemy and none at any time has been an alien enemy or an alien or a national or a citizen or a subject of any foreign, sovereign, government, power or nation. Each of said persons was born in the United States and ever since continuously has been and now is subject to the jurisdiction thereof and is a national of and a citizen of the United States, as provided by the 14th Amendment of the Constitution, and as such is entitled to all the rights, liberties, privileges and immunities of national citizenship and to those

rights secured to persons by the 5th Amendment of the Constitution.

As the attorney duly authorized to represent and representing each of said persons whose name appears on the attached and annexed list which is incorporated herein, and for and on behalf of each of them, I hereby withdraw, retract, rescind, revoke, cancel and annul each of said renunciations and renunciation forms executed by each of them upon the following grounds and for the following reasons, among other grounds and reasons, to-wit:

1. That the said renunciation was invalid and void in its inception and also in its execution and has never become and cannot become effective;

2. That neither an approval nor an order approving the said renunciation has been made or issued by the Attorney General of the United States and none possessing validity can be made;

3. That neither an approval nor an order approving the said renunciation can be made by a subordinate executive officer in the absence of a specific statutory authority having been lodged by Congress in the Attorney General of the United States to delegate such a discretionary authority to be exercised by any person;

4. That the provisions of 8 USCA, sec. 801(i), and regulations issued pursuant thereto, on their face and also as construed and applied to each of said persons, are unconstitutional and void for being repugnant to the 5th, 6th, 9th, 10th and 14th Amendments and in contravention of the privileges

and immunities secured to each of them by the provisions of Article IV, sec. 2, of the Constitution;

5. That the application of the provisions of 8 USCA, sec. 801(i), and regulations issued pursuant thereto, to each of said persons is in excess of congressional authority lodged in Congress by Article I of the Constitution and is void as being extra-constitutional;

6. That an approval of said renunciation form, if given, and the giving of notice thereof, were, and each of said things was, in fact and in law, contrary to the interests of national defense and also contrary to the sovereignty of the United States, and for each of said reasons is invalid and void;

7. At the time said renunciation form was signed and ever since then the renunciant, together with a member or members of his or her immediate family, was and still is held in duress, then and their being unlawfully imprisoned in the said Tule Lake Center, under a claim of color of official governmental authority, and being deprived of practically all his or her constitutional rights, liberties, privileges and immunities guaranteed to him or her as a citizen and national of the United States by birth and by choice and of practically all his or her rights as a person secured by the Constitution. While thus imprisoned and held in duress renunciant was made the unwilling victim of fraud, menace and undue influence and was mistreated, discriminated against, harassed and oppressed solely by reason of the irrelevance of the national-

ity of his or her ancestors and their historical and geographical origin;

8. At the farcical hearing on said renunciation which, held under the aforesaid circumstances, was nothing but a perfunctory appearance, the hearing officer's recommendation thereon was based, either in whole or in part, upon secret information and data available to and used by the hearing officer but which was withheld and kept secret from renunciant, and the approval thereof and order approving said renunciation, if any ever was made, was wholly or partially based thereon and, therefore, is invalid and void as a deprivation of a fair and impartial hearing, in violation of the provisions of the 6th Amendment, and as a denial of due process of law, in violation of the provisions of the 5th Amendment;

9. That the United States government, acting by and through its officials, agents, servants and employees, as the guardian and custodian of the person of renunciant and of the persons of members of his or her immediate family, its wards, knowingly and deliberately took a gross advantage of renunciant who then and there was held in duress and in a constant state of terror and subjected to menace, fraud and undue influence and deliberately deprived renunciant of the benefit of independent advice and counsel in and about the hearing on said renunciation and the execution of said renunciation form and failed to inform renunciant that a renunciation would result in his or her deportation to

Japan. The authorities confining renunciant to said prison also recently commanded renunciant to register as an alien, under pain of punishment provided for violation of the Alien Registration Act of 1940 for refusal so to do, and also demanded of many renunciants a false declaration, in a non-repatriation application, to the effect that renunciant was a person of Japanese nationality or a dual citizen despite the fact said authorities then knew, as a matter of fact and of law, that renunciant was of United States nationality and not a dual citizen, and also refused to accept written protests against such registration and declarations;

10. The time, place and circumstances under which said renunciation form was signed by renunciant did not constitute a fair and impartial hearing or trial and, in fact and in law, constituted a denial of renunciant's constitutional guaranty of due process of law and of the equal protection of the laws, in violation of the provisions of the 6th and 5th Amendments of the Constitution and, in addition thereto, constituted an unconstitutional deprivation thereunder of all of those inalienable rights of national citizenship and of persons flowing from the facts of birth and residence in this country and which inhere in and attach to renunciant;

11. That at the time said renunciation form was signed the renunciant was not a free agent in any sense of the words but, together with members of his or her immediate family, then and there was

and for a long period of time prior thereto had been and still is unlawfully confined to a concentration camp and restrained of his or her liberty, under a claim of color of authority of the United States, albeit in the absence of crime upon his or her part and without a charge or accusation of crime having been lodged against him or her. Said renunciation was exacted from renunciant while he or she was held in duress by the government acting through its officials, agents, servants and employees and while renunciant was, by them, knowingly permitted to be subjected to the menace, fraud, undue influence and duress exerted and practiced upon him or her by the government and its agents and especially by organized terroristic groups and gangs of persons, and other individuals, who were confined to said Center, which groups had established and maintained a veritable reign of terror over the internees;

12. That said renunciation was neither free nor voluntary on the part of renunciant but was the product of fear, torment and terror induced in renunciant's mind by virtue of the governmental duress in which renunciant then and there was held which operated to deprive renunciant of freedom of choice, will and desire in and about the execution of the same; and at the time renunciation hearings were being held in said Center the government and its agents led the internees to believe and since then has led them to believe, by word and conduct, that renunciations were not final but were subject to

being withdrawn and cancelled, in like manner as requests for repatriation were subject to withdrawal and cancellation, and thereby lulled them into a false sense of security and also led them to believe that renunciations would not result in a renunciant's involuntary deportation to Japan and thereby also lulled them into a false sense of security;

13. That said renunciation was neither free nor voluntary on the part of renunciant but was the product of fear, torment and terror induced in renunciant's mind by virtue of the duress in which he or she then was held and by virtue of the duress, menace, fraud and undue influence practiced upon and exercised against renunciant and members of renunciant's immediate family by terroristic groups and gangs of disloyal, subversive and fanatical persons there actively engaged in developing and promoting loyalty to Japan, and by other individuals, likewise confined to said Center, who intimidated, coerced and compelled renunciant to execute said renunciation form by threats, exhibitions and examples of physical violence against the person of renunciant and members of renunciant's family, all of which operated to deprive renunciant of freedom of choice, will and desire in and about the execution of the same. The truth of this is acknowledged in the letter of the Department of Justice dated January 18, 1945, addressed to the respective chairman of the Sokuji Kikoku Hoshi Dan and the Hokuku Seinen Dan at the Tule Lake Center,

copies of which, at the instance of your Department, were posted promiscuously in the said Center;

14. Renunciant signed said renunciation form as a result of the duress, menace, fraud and undue influence to which he or she and renunciant's family confined to said Center constantly were subjected by the government, and its agents, as renunciant's jailor and custodian, and by the afore-said terroristic groups, gangs and individuals to whose studied and continuous campaign of terrorism and criminal oppression renunciant there helplessly was exposed and such renunciation was and is false, fictitious and void for each of said reasons:

15. That said renunciation was neither free or voluntary; the renunciant was compelled, intimidated and coerced into signing said renunciation form by reason of threats of unlawful and violent injury to the person, property and character of renunciant and to members of renunciant's family, made by disloyal, subversive and dangerous pressure groups, gangs and individuals harbored and detained in said Center. These were freely allowed and permitted by the government, as the jailor and custodian of renunciant, to menace, intimidate, coerce and terrorize renunciant and many other loyal American citizens there confined, by oral means, by displays, shows, parades, demonstrations and exhibitions of force and violence, and by threats of inflicting great physical injury and loss of life upon renunciant and other loyal American

citizens there confined, thereby compelling them involuntarily to execute such renunciations. The renunciant was in constant fear, as was his or her immediate family and other loyal internees, and believed and feared, as did members of his or her family, that said threats would be carried into execution if said renunciation was not signed. The renunciant was acting under the duress, menace, fraud and undue influence of said groups and gangs, and of other individuals confined to said Center, and by virtue thereof, signed said renunciation form under compulsion and in fear of said threats. The government failed to accord renunciant and said persons the protection against said lawlessness and terrorism although protection against the same was their due. It failed to halt or put a stop thereto and thereby contributed to the mass hysteria and terroristic state in which they were held. Of all these facts your predecessor in office, the agents of your Department and the authorities in charge of said Center then were aware;

16. That at the time said renunciation application was signed renunciant had been informed and led to believe and believed, by virtue of said imprisonment, duress and the undue influence under which he or she was laboring, that it was a matter commanded by the government, compliance with which was a prerequisite to the right to remain in the protective security of said Center, as also to prevent a disuniting of renunciant's family. In addition, you are aware of the great number of overt and covert acts committed, the misrepresentations made

by and the undue influence exercised over renunciant and other internees by the said terroristic pressure groups and gangs of disloyal, subversive and criminally inclined persons, likewise there confined, who compelled the applications to be signed. For a long time prior to the signing of said application, at said time and since such groups and gangs knowingly and recklessly were permitted by the government and its agents to engage in and carry on their continuous campaign of lawlessness and terror against renunciant and other loyal internees there confined and to establish and maintain a rule of terror over them. These groups and gangs were openly permitted and allowed to preach and practice sedition, to terrorize the internees and to endeavor to proselyte to the cause of the enemy those loyal American citizens and aliens friendly to the United States there interned. They were permitted to and did menace, intimidate and coerce thousands of loyal and law abiding internees, by means of threats and resorts to demonstrations, exhibitions and examples of individual assaults and batteries and mob violence, into compelling renunciant and thousands of others to execute said renunciation form.

The government neither prevented nor stopped the said reign of terror. It afforded the internees neither help nor protection against it. It failed to prosecute the active leaders and members of said groups and gangs for the commission of such criminal acts. By reason of said rule of terror, which kept the internees in a constant state of mass hys-

teria, and in the absence of protection against the same being afforded by the government, many loyal and innocent but helpless internees were driven to become nominal but inactive members of such groups simply to save themselves and their families from danger, physical violence and probable loss of life from said sources;

17. Each of said persons was informed, by public announcements made by governmental authorities just prior to the time said renunciations were signed, and concurrently therewith, that his or her deportation to Japan, along with alien members of his or her family, on an exchange ship, was imminent and impending and each and all of them, by said pressure groups and gangs active in said Center and members thereof, were threatened that if he or she failed to sign an application for renunciation the security of each and that of their families upon arrival in Japan would be endangered because the pro-Japanese leaders of said nationalistic pressure groups and gangs would report them to the Japanese government as being dangerous alien enemies to Japan and as American spies, in which said announcements and representations he or she and his or her family and other internees detained in said Center believed and feared would be the treatment accorded them all. Said groups and gangs maintained an elaborate system of black-listing and espionage over the internees in said Center as part of the program of systematic tyranny to which they subjected the internees;

18. At the time said renunciation was signed and for weeks prior thereto active leaders and members of said pressure groups threatened said persons and each of them if any of them talked to, associated with or communicated with any of the Caucasians within or without said Center to whose charge they were committed or with any Caucasians there employed that such persons so doing would be assaulted by terroristic gangs sponsored by said pressure groups. Each of said persons believed in and feared and had good cause and reason to believe in and fear, that said threats against him or her would be carried into execution and that he or she and their families would be exposed to physical violence and probable loss of life if he or she failed to heed said threats and refused to obey the mandates of said pressure groups.

It may interest you to learn, although I presume you long ago must have been informed, that such pressure groups and gangs maintained, operated and conducted special coaching schools in the Center for the express purpose of coaching the helpless victims of their fraud, menace, deceit and undue influence upon the questions the hearing officers were to propound to them and the answers they were to give thereto at the scheduled hearings on the renunciation applications. You have been informed, I presume, that at least one loyal internee was murdered in said Center and that it does not seem ever to have been doubted by the internees and their custodians that the murderer was an active member

of one of the terroristic groups operating therein and carrying out its mandate. You are aware that the government and its agents made little, if any, effort to suppress and none to isolate the active criminal members of such groups. You know that none of the leaders or active members of said groups and gangs were prosecuted criminally for their lawless acts. Had the federal sedition and espionage or other criminal laws been invoked against them their lawlessness would have been checked;

19. In the event of a refusal to execute such a renunciation from the renunciant, together with renunciant's immediate family, was informed, believed and feared, by reason of said duress, intimidation and coercion, and by reason of representations made by said disloyal groups, gangs, and by other individuals confined to said Center, that renunciant and members of renunciant's family would be expelled and removed from the comparative security of his or her then prison and the custody of his or her then jailors and custodians and would be driven back, friendless, propertyless and protectionless, into civil life in a community highly prejudiced against and hostile to renunciant and renunciant's family because of their descent from persons of Japanese ancestry and there would be exposed to and suffer great bodily harm, injury and probable loss of life by virtue of existing mob violence and the criminal intentions of lawless individuals who regard all persons of Japanese descent as

enemies upon whom they might with impunity inflict injury.

For the said reasons renunciant was led to believe and believed that if renunciant signed said renunciation form the renunciant, together with his or her family, would be permitted, allowed and entitled to remain in the relative security afforded by said Center, renunciant's jailors and custodians until such time as the war had terminated, peace had been restored and such community prejudice, hostility and violence subsided and ceased. In the face of said threats and while held in duress and also acting upon said representations so made, the renunciant, under the circumstances aforesaid, believed and feared and had good cause to believe and to fear that if he or she failed to execute the renunciation form renunciant and renunciant's family would be driven from said Center and would be exposed to and would suffer great harm and physical violence from said lawless sources. These are facts and matters of common knowledge of which the renunciant's jailors, custodians, the then Attorney General and the Department of Justice and its agents well were aware.

The failure of the government and its authorities and agents to segregate and isolate and prosecute the rabid and dangerous leaders and active members of said groups and gangs who were fanatically loyal to Japan and serving the cause of our enemy and who then desired and still desire to be repatriated to Japan and who should be sent there, and

through such a procedure effectively to prevent them from inoculating interned loyal American citizens and friendly aliens with the virus of disloyalty, despite the repeated pleas made for such relief and protection, is, in itself, ample proof of the abusive treatment suffered by renunciant and thousands of other internees loyal to the United States and of the duress in which renunciant and they unlawfully were held;

20. Nearly all the confined male citizens of draft age in said Center, including those who had served faithfully in our armed forces and held honorable discharges therefrom, and there were hundreds of these, and many others who were transferred, by the military authorities, from active duty to the enlisted reserve and who, with such status, are still subject to being called for active duty, were classified as "4-C" by draft boards acting upon instructions of the government. They were thus detained, treated and falsely classified as "alien enemies," that is to say, "4-C," without good cause, without justification and in violation of their rights as American citizens. By reason thereof, they were led to believe that the government of the United States regarded them not as citizens but as alien enemies. Said conduct upon the part of the government compelled them formally to make a fictitious renunciation of a citizenship of which each already, in fact, had been deprived by the government. Many of the renunciants who are confined to said Center repeatedly have tried to enlist in our armed forces but were denied the right to fight for and

defend our country by prejudiced and hostile draft boards and by governmental authority and still are denied this birthright;

21. In approving renunciations, if any were approved, a gross discrimination against the family unity of the confined persons was practiced, the governmental objective being the deportation of all renunciants. In accepting the renunciation of one member of a family and refusing another the government divides and disunites the families. The purpose of this was and is to cause a mass exodus of persons of Japanese ancestry from this country. It effectuates this purpose by compelling citizens who have not renounced to the hard choice of either remaining in this country separated from their wives, husbands, brothers, sisters, parents and children or being compelled to be the victims of a forced banishment necessitated to preserve family unity. Hundreds of our heroic soldiers of Japanese ancestry are returning from the battlefields of Europe and the Pacific to find their families divided, members thereof interned in the Center and themselves faced with such a distressing and terrible choice;

22. By reason of the 1942 evacuation from the western states and the subsequent prolonged detention of renunciant and persons of like ancestry in concentration camps the renunciant was driven into becoming a refugee from unjust racial discrimination, prejudice and hate. As a consequence of the mistreatment by the government and a hos-

tile segment of the public, both regarding and treating renunciant and persons of like ancestry as being persons of an inferior and degraded race unworthy of social acceptance on a basis of equality, the renunciant and persons of like ancestry were ostracized and forced to accept refuge from such discrimination, prejudice and hate by a retreat into the mass of persons of like ancestry held in confinement as if they were racial outcasts instinctively seeking refuge in inconspicuousness;

23. Many of the said persons whose names appear on the attached list, at the time of signing said renunciation, were minors under the age of 21 years and hence were laboring under a legal disability. Neither the provisions of the Nationality Act of 1940, as amended, nor any regulations issued pursuant thereto nor the provisions of any other statute or law authorizes a renunciation of U. S. Nationality by a minor under the age of 21 years. Neither under the provisions of 8 USCA, sec. 801 (i), nor under the Nationality Regulations is there any authority lodged in the Attorney General or any executive officer to fix 18 years as the age of maturity for renunciation purposes. I wish to point out that there is no legal authority or precedent whatever for acceptance or approval of renunciations executed by persons laboring under legal disabilities. I draw your attention to the fact that not only have minors who signed renunciation forms received notice from your office that such were approved but that others who labored

under legal disabilities also have received like notices. I direct your attention to the fact that it is a matter of common knowledge in and about the Tule Lake Center that one person who was hopelessly non compos mentis at the time of signing a renunciation application, upon which a letter issued from your office giving notice of approval thereof, shortly thereafter was hurried away to a State institution for the insane;

24. None of the persons whose name appears on the attached list is a citizen, subject or national of Japan. None of them owes any allegiance to Japan or any foreign sovereign, government, power or nation. None of them has ever had, held or given any such allegiance or acknowledged or recognized any such allegiance. None of them is an alien enemy. None of them is an alien. None of them holds or has at any time ever held or accepted any dual citizenship by any act upon his or her part. It is impossible that any of them at any time could have held any dual citizenship. None of them has at any time accepted or recognized his or her status as being that of a dualistic or pluralistic citizen, such a status being impossible as having been expressly disavowed by the provisions of Title 8 U.S. Code, sec. 800, and its predecessor statute, 8 U.S. Code, sec. 15. If any of said persons at said renunciation hearings or at any time during said confinement stated he or she was a dual citizen such a statement was a mutual mistake of law and also was a mistake of fact then known to be such by the

hearing officer, the government and its agents at the time and the same, if made, was made solely by reason of the aforesaid duress and undue influence, and if any such statement was made at any other time it was the product of hearsay, misinformation and guesswork and was a mistake of fact. You are aware that many of the internees at said Center took affirmative steps, prior to the time of evacuation from the west coast, to cancel a dual citizenship they never possessed;

25. I direct your attention to the fact and principle of law that a minor or other person who is under a legal disability and hence is not *sui juris* could not be bound by a futile registration made by parents which may have been misunderstood by them to confer such a status. As a matter of fact and of law none of the persons whose names appear on the attached list, of whom many are under the age of 21 years, has at any time whatever held, accepted or recognized any citizenship or allegiance to any country or nation save and except that in and to the United States. Each of them recognizes but one sovereign and that sovereign is the United States to which each ever has given his or her undivided loyalty and allegiance. Unfortunately none of them was given an opportunity to demonstrate his or her loyalty affirmatively—imprisonment and mistreatment prevented such demonstration.

V-E Day is long behind us. V-J Day has come and passed. The war long has been over, Mr. At-

torney General. The detention even of alien enemies is not now authorized by the Alien Enemy Act which is operative only during wartime and can no longer be justified thereunder. It cannot be asserted with any degree of truth whatever that the Alien Enemy Act may lawfully be invoked to confine citizens, stateless persons or aliens. There now exists no legitimate reason or ground why even alien enemies long resident in this country and not hostile thereto should be confined to an internment camp. There is absolutely no reason or ground that can be offered in justification for the present detention and internment of the persons whom I represent and whose names appear on the attached list whether you view them either as citizens or as stateless persons.

Inasmuch as duress, menace, fraud, mistakes or law and fact, and undue influence caused the execution of the renunciation form on the part of each of the persons whose name appears on the attached list, of which facts you and officers of your Department have knowledge, you are empowered to accept the revocation and cancellation thereof and to withhold, withdraw and revoke any acceptance or approval of each of them, if any such acceptance ever was made or approval ever was given in any case. You are also empowered and authorized to order the release and discharge of each of said persons from internment. Each of said persons demands such a release and discharge from the custody in which he or she now is held by agents acting under your authority, direction and control.

These renunciants whom I represent are long suffering citizens. They have submitted to grosser indignities and suffered greater losses of rights and liberties than any other group of persons during the entire history of the nation, all without good cause or reason. They have been misunderstood, slandered, abused and long have been held up to public ridicule, shame and contempt. The mistreatment was initiated by an unjustified evacuation from the west coast, was intensified by imprisonment in a concentration camp for over three years, with all the attendant suffering and misery this entailed, and now these internees, faced with a loss of citizenship rights, are confronted with a threatened involuntary deportation to Japan, a country and nation to which they owe no allegiance, which has no claim upon them and with which they are not familiar. It is time this whole pernicious program of oppression was terminated. It is time the exercise of arbitrary and capricious power over them should cease. The damage done them cannot be repaired but further injury can be stopped. You have the right and the power to call halt to this program. You can prevent further mischief being done and thereby alleviate the misery these unfortunate people endure.

In the event that you fail to take immediate action on the foregoing demands each of the persons whose name appears on the attached list, having no alternative save so to do, will institute such legal proceedings as may be lawful and of which he or

she may be advised to effectuate the cancellation of his or her aforesaid renunciation form and renunciation of U. S. nationality, to prevent his or her deportation to Japan, to terminate his or her internment and to obtain release from the present restraint upon his or her liberty and to obtain whatsoever other redress law or equity may afford.

Yours very truly,

/s/ WAYNE M. COLLINS,

As attorney for each of the persons whose name appears on the attached and annexed list of names.

Duplicate originals to:

State Department, Washington, D. C.

Alien Property Custodian, Washington, D. C.

Foreign Funds Control Section of the Treasury Department, Washington, D. C.

Federal Bureau of Investigation, Washington, D. C.

Immigration and Naturalization Service of the Department of Justice, Washington, D. C.,

Officer in Charge, U. S. Department of Justice Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California, said Officer in Charge presently being Ivan Williams, Tule Lake Center, Newell, Modoc County, California.

List of Names

(Internees at Tule Lake Center)

TADAYASU ABO, et al.,—adults, individually,

and as constituting a class, and as representatives of a class,

and

GENSHYO AMBO, et al.,—minors, individually, and constituting a class, and as representatives of a class, by HARRY UCHIDA as the next of friend and as guardian ad litem of them and each of them,

Plaintiffs.

[Endorsed]: Filed Nov. 13, 1945.

[Title of District Court and Cause.]

ORDER APPOINTING NEXT OF FRIEND
AND GUARDIAN AD LITEM FOR MINOR
PLAINTIFFS

Upon reading and filing the verified complaint, and on the motion of Wayne M. Collins, Esq., attorney for plaintiffs, and good cause appearing therefor,

It Is Ordered that the minors named in the above-entitled cause be and each of them is hereby authorized to appear herein by Harry Uchida as his or her next of friend and as guardian ad litem of them and each of them.

Dated: November 13, 1945.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Nov. 13, 1945.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas the Attorney General of the United States, through the instrumentality of the United States Department of Justice, a federal agency, contemplates and intends to conduct "mitigation-hearings" of persons asserted to be renunciants of United States nationality who are detained in the custody of the defendants at the Tule Lake Center, Newell, Modoc County, California, and of certain other asserted renunciants detained under his authority at the Fort Lincoln Detention Camp at Bismarck, N. D., and at the Alien Internment Camp at Santa Fe, New Mexico, and including the plaintiffs named in the above-entitled proceeding who are detained in custody of defendants at said Tule Lake Center and also those similarly detained persons who, from time to time, may be joined and included as plaintiffs in said class action, and

Whereas at said such hearings which are expected to be commenced during the month of January, 1946, such asserted renunciants are to be given an opportunity to show cause why they should not be deported to Japan by the said Attorney General, and

Whereas it is agreed by the parties hereto and said Attorney General that such plaintiffs shall not file individual written statements on any applications for any such mitigation hearings or be required to make oral statements at such hearings

reserving their rights which would increase to an enormous extent the paper work of the examiners who are to conduct such hearings and absorb an unusual amount of their time.

It Is Stipulated between the parties hereto and said Attorney General that neither the application of any of said such plaintiffs to have such mitigation hearings nor their submission thereto shall operate as or constitute a waiver of any constitutional, statutory or other legal rights or remedies asserted in the above-entitled proceeding by any plaintiff nor shall the same in anywise bar or prejudice their right to maintain said action.

Dated: December 31, 1945.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General of U. S.,
IVAN WILLIAMS,
FRANK J. HENNESSY,
U. S. Attorney,
Defendants.

By /s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered: December 31, 1945.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Dec. 31, 1945.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas the Attorney General of the United States, through the instrumentality of the United States Department of Justice, a federal agency, contemplates and intends to conduct "mitigation-hearings" of persons asserted to be renunciants of United States nationality who are detained in the custody of the defendants at the Tule Lake Center, Newell, Modoc County, California, and of certain other asserted renunciants detained under his authority at the Fort Lincoln Detention Camp at Bismarck, N. D., and at the Alien Internment Camp at Santa Fe, New Mexico, and including the plaintiffs named in the above-entitled proceeding who are detained in custody of defendants at said Tule Lake Center and also those similarly detained persons who, from time to time, may be joined and included as plaintiffs in said class action, and

Whereas at said such hearings which are expected to be commenced during the month of January, 1946, such asserted renunciants are to be given an opportunity to show cause why they should not be deported to Japan by the said Attorney General, and

Whereas it is agreed by the parties hereto and said Attorney General that such plaintiffs shall not file individual written statements on any applications for any such mitigation hearings or be required to make oral statements at such hearings reserving their rights which would increase to an

enormous extent the paper work of the examiners who are to conduct such hearings and absorb an unusual amount of their time,

It Is Stipulated between the parties hereto and said Attorney General that upon applying for or submitting to such a mitigation hearing each plaintiff in the above entitled action shall be deemed to have objected to such hearing upon the grounds that he or she is a native born citizen of the United States and not subject thereto, and that he or she does not intend the same to operate as or constitute a waiver of any constitutional, statutory, or other legal right or remedy asserted in the above entitled action by him or her, or in any wise to bar or prejudice his or her right to maintain said action.

It Is Further Stipulated that the stipulation dated December 31, 1945, executed by William E. Licking for defendants, and the order of Court made thereon and filed herein on December 31, 1945, be vacated and set aside.

Dated: January 2, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General of U. S.
IVAN WILLIAMS,
FRANK J. HENNESSY,
United States Attorney,
Defendants.

By /s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered: January 2, 1946.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Jan. 2, 1946.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Stipulated between the parties hereto that the defendants herein may have to and including the 11th day of February, 1946, within which to answer or plead to the complaint of plaintiffs herein, or to make such motion as they may be advised.

Dated: January 2, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.
TOM C. CLARK,
Attorney General of the U. S.
FRANK J. HENNESSY,
U. S. Attorney.

By /s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered: January 2, 1946.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Jan. 2, 1946.

[Title of District Court and Cause.]

SUPPLEMENT AND AMENDMENT TO COMPLAINT TO RESCIND RENUNCIATIONS OF NATIONALITY

Come the plaintiffs in the above-entitled action, supplementing and amending the complaint to rescind renunciations of nationality herein by the following allegations to be added to Paragraph II (1) of the Second Cause of Action therein contained, immediately following the matter ending on line 26 of page 19 of said Complaint To Rescind Renunciations of Nationality, to-wit:

(c) The pressure groups and gangs, mentioned in paragraph II (1) of said "Complaint To Rescind Renunciations," originated in said Tule Lake Center in 1944 as a Japanese educational and cultural movement sponsored and fostered by the War Relocation Authority, a federal executive agency to the charge of which the evacuees in said Center, including all the plaintiffs herein, were committed; said movement, then and thereafter until all the renunciation forms therein mentioned had been signed and pseudo-hearings held thereon, was conducted with the full knowledge and consent of said agency and under the eyes of its officers, agents and employees; said movement developed into a racket cast in the form of an innocuous appearing "innocents front" organization; thereafter, by its organizers, leaders and controllers, a majority if not all of whom were aliens of Japanese nativity, it was

converted into a pro-Japanese nationalistic movement; at the time of said renunciation hearings it had developed into and was an active terroristic movement controlled by a leadership of such aliens whose design, purpose and actions gave such direction thereto and compelled in excess of eighty (80%) percent of the total number of citizens prisoners over 18 years of age there confined who signed renunciation applications, included in which percentage is each plaintiff herein, to sign applications for renunciation of U.S. nationality, all as admitted by the Government and therefore by defendants in Exhibit "2" attached hereto and made a part hereof; that the real nature, purposes and bent of said movement, under such leadership, was concealed from its inactive members who had joined it when it appeared to them to be a simple educational and cultural movement, as aforesaid, and when its true nature and purposes had not been revealed and were not discernible; that when the true nature and purposes thereof became apparent many members thereof did not dare to protest the course thereof or openly resign therefrom because of the coercion of said groups and gangs and for fear their own personal security and the security of members of their families thereby would be endangered, and many persons confined to said Center, including some of the plaintiffs herein, were compelled to join the same as inactive members for like security reasons while acting in fear of said groups and gangs by reason of said coercion and while held in duress by them.

(d) That while the aforesaid campaign of terror was reigning at said Tule Lake Center and as the proximate result thereof 5,371 native-born Americans over 18 years of age, among whom are each of the plaintiffs, executed applications for renunciation of United States nationality; that in excess of 5,346 of said native-born Americans, including each of the plaintiffs, did so as the direct and proximate result of and by virtue of the duress in which they then and there and for a long period of time prior thereto had been held by the United States Government, its agents, servants and employees and particularly by the War Relocation Authority aforesaid, and by virtue of the fraud, menace and undue influence of the aforesaid groups and gangs operating therein and the duress in which they were held by said groups and gangs and against which the United States Government, its agents, servants and employees and particularly the War Relocation Authority gave the plaintiffs no protection but openly allowed and therefore aided, abetted and participated in;

That the United States Government, by and through the Department of the Interior and the Secretary of the Interior as the head of the War Relocation Authority to whose charge plaintiffs and all prisoners confined in said Tule Lake Center were committed at the time of said renunciations, through the Under Secretary of the Interior, on August 6, 1945, made an executive finding in writing, admitting and publishing therein the fact that

it was "primarily due" to the undue influence, fraud, menace and duress practiced upon the evacuees detained in said Court by the aforesaid groups and gangs that caused renunciation applications to be signed by "over 80% of the citizens" there confined who were deemed eligible to renounce U.S. nationality; that a photostat copy of said writing is attached hereto, made a part hereof and is marked Exhibit "2"; that the responsibility for and the cause of in excess of 5,346 of said 5,371 total of said renunciations rests with the War Relocation Authority to which agency the immediate charge of said persons in said Center was committed for carrying into execution the policy adopted by it and under which it sponsored and fostered the cultural movement aforesaid and permitted the diversion thereof into the terroristic movement aforesaid and for its failure and refusal to take precautionary measures to prevent such rule of terror and to protect the plaintiffs from harm and to safeguard their rights as American citizens;

(e) Shortly after the time the said applications for renunciation had been signed at said Center by the plaintiffs the government of the United States, acting by and through the War Relocation Authority, and its agents, suddenly formulated and carried into execution the following program and policy, to-wit:

It seized all the organizers, leaders and active members of the aforesaid pro-Japanese nationalistic

pressure groups and gangs, the great majority of whom were aliens of Japanese nativity, along with many other aliens and native-born Americans of Japanese ancestry then confined to said Center and who were harmless and innocent of any wrong doing and who never at any time were hostile or dangerous to our security or to the security of any person in said Center, and forcibly removed them to internment camps situated in Bismarck, N. D., Santa Fe, N.M. and Crystal City, Texas, from whence all of the organizers, leaders and active members and persons then of disloyal bent thereafter and since the filing of this petition were voluntarily repatriated to Japan by the U.S. Government; in addition to said persons so repatriated, a number of native-born Americans and alien Japanese innocent of wrong doing voluntarily repatriated to Japan therefrom because of their aforesaid long mistreatment by this government, including among them a number of American nationals, renunciants and inactive members of said pressure groups who were subject to the undue influence of and under the duress of said groups and gangs and whose repatriation was due to the undue influence and duress thereof; that in excess of 8000 persons of Japanese ancestry have been repatriated to Japan from said Center and camps; that in excess of twenty (20%) percent of the renunciants originally confined to said Center who signed said renunciation applications have since then been repatriated to Japan from said Tule Lake Center, the Fort Lincoln Internment Camp at Bismarck,

North Dakota, the Alien Internment Camp at Santa Fe, New Mexico, and the Alien Internment Camp at Crystal City, Texas;

All the renunciants, including plaintiffs, who have not been repatriated or deported to Japan are either persons who never were members of or associated with the aforesaid pressure movement, groups and gangs or are persons who resigned from said movement upon learning the true character and purposes thereof and who did not participate in or sympathize with the unlawful and wrongful acts and purposes thereof or who were forced to join the same to avert danger to themselves or members of their families and who resigned therefrom or ceased to have connection with the same upon learning the true nature and character thereof;

That while the plaintiffs were in the aforesaid Tule Lake Center they, as also those who later were incarcerated in Bismarck and Santa Fe, constantly were subjected to the surveillance, menace, fraud and undue influence of said leaders of said movement, which was carried over into the said Camps at Bismarck and Santa Fe by leaders and active members thereof who had been transported thereto, as aforesaid, and who there established and carried on a like reign of terror over the persons there confined; that said menace, fraud and undue influence and duress did not abate until the Government initiated its program of voluntary repatriation to Japan and did not cease until all the leaders thereof in said Center and Camps had been repatriated subsequent to the filing of this suit;

(f) That the pseudo-hearings conducted by the Government on the renunciation applications at said Center were arbitrary, unreasonable and oppressive and plaintiffs thereat were deprived of the benefit of and the assistance of counsel, as aforesaid; that at the "mitigation-hearings" conducted after the filing of this suit at the Tule Lake Center, the Fort Lincoln Internment Camp at Bismarck and the Alien Internment Camp at Santa Fe, during January and February of 1946, at which the plaintiffs were ordered by the Attorney General of the United States to show cause why they by him should not be deported to Japan, each was arbitrarily subjected to such examination or hearing by said Attorney General and was denied the right and opportunity to be represented thereat by their counsel; that said hearings, in truth and in fact, were pseudo-hearings in which the plaintiffs summarily were scheduled for such examinations before hearing officers, appointed by the Attorney General, without reasonable time or opportunity to prepare therefor or to obtain witnesses or evidence in their behalf; that neither plaintiffs nor witnesses thereat were sworn; that the hearings were unduly brief; that neither the opportunity nor the privilege of inspection of any evidence or evidence adverse to them was afforded plaintiffs nor was any adverse evidence offered against them; that at said hearings, as also upon a review of the recommendations of such hearing officers by the Attorney General and his reviewing staff thereon, said hearing officers, the

Attorney General and his said reviewing staff, in refusing to recommend many plaintiffs for release from detention and to release them therefrom, considered and gave controlling weight to secret information contained in files maintained by such officers which was never made known to said plaintiffs and was not introduced into evidence at said hearings against them, and based such refusals upon whim and caprice; that at said fictitious administrative hearings, as also at the pseudo-hearings on the renunciation applications aforesaid, the hearing officers or examiners exacted statements and evidence from said plaintiffs and used information from their own secret dossiers against them as part of the systematic duress in which the government long had held and then was holding plaintiffs; that no evidence of an adverse character was adduced at said hearings against any plaintiff or that in anywise showed or tended to show any plaintiff was hostile or dangerous to the security of this country; that said hearings were arbitrary, unreasonable and oppressive in character and wholly unfair and impartial and in violation of the 5th Amendment's guaranty of due process of law;

That in January of 1946 when plaintiffs' counsel visited those of his plaintiff clients herein at their places of internment in Bismarck, North Dakota, and Santa Fe, New Mexico, in response to their written requests, to advise them upon their legal rights to freedom from deportation, release from detention and the cancellation of their renunciation

applications the Government, acting by and through its agents in charge of said camps for the Department of Justice, over their oral protest and that of their counsel, refused said plaintiffs and their said attorney the fundamental right of privilege communications and privacy ordinarily existing between an attorney and his clients and compelled them to hold such conferences and consultations in the presence of an official agent or censor for the Government who supervised such conferences and consultations and listened to and eavesdropped thereon, and thereby deprived said plaintiffs of the assistance of counsel and the benefits of privileged communications, in violation of the constitutional guaranty of due process of law, and said conduct on the part of the government was part and parcel of the duress in which it held said plaintiffs; that said plaintiffs, through their counsel, have protested the said mistreatment in writing to the Attorney General, and the officers in charge of said camps and other governmental officers; that a copy of said protest is attached hereto and made a part hereof and is marked Exhibit "3."

(g) That at said Tule Lake Center during October, 1945, and ever since then, and on in excess of twenty (20) occasions, the said War Relocation Authority has made recordings of the long distance telephone conversations had between said Center and San Francisco between plaintiffs and their counsel concerning their rights and the progress of this suit and has published the same despite the

fact that the same was and is an interference with the privilege communication relationship existing between plaintiffs and their said counsel, an interference with their right of privacy and a denial of their right to counsel and a deprivation of their rights safeguarded by the 4th and 5th Amendments; that said practice upon the part of said War Relocation Authority has been and is a part of the generalized duress in which plaintiffs have been and are held by the Government;

(h) Prior to the time of the aforesaid renunciation hearings the U.S. Government, through the War Relocation Authority, set up at the Tule Lake Center a special jail, termed "The Stockade," within the limits of said prison or concentration camp wherein, without cause, it "incarcerated" innocent citizens, detained in said Center, without accusation of crime or wrongdoing on their part and without hearings on the cause therefor at any time having been afforded them and without allowing them the assistance of counsel and there held hundreds of them incommunicado for various periods of time ranging from a few hours to 360 days, all without cause; that said practice was designed to instil and did instil in the prisoners-evacuees confined to said Center an unwholesome fear of the arbitrary governmental power wielded over the evacuees confined to said Center and was a part and phase of the generalized campaign of duress in which the Government held the residents of said Center and said practice was continued

during the time of said renunciation hearings and thereafter; that in August, 1944, the threat of filing habeas corpus petitions for fourteen (14) persons, and in August, 1945, the filing of five (5) petitions in this Court for writs of habeas corpus for five persons, succeeded in liberating the total nineteen residents of said Center then unlawfully jailed in said Stockade.

(i) That as part of the Government's systematic program of duress in which it held the plaintiffs and all residents in said Center the War Relocation Authority set up, established and maintained for the past four years a slavery and peonage system at said Center; in furtherance of this oppression it organized in said Center what is known as the "Recreation Club" for the private and personal benefit of the Caucasian employees of said War Relocation Authority who were members thereof and through such an instrumentality deliberately exploited persons of Japanese ancestry confined to its charge; pursuant thereto members thereof paid in to said Club the sum of \$30.00 per month and the said Club thereupon hired out to such member one of the internees to serve such member in private employment in the capacity of a slave or peon, either as house-maid, domestic, servant, cook, janitor, waitress, mess-attendant or in another menial capacity, and paid such person therefor either the sum of \$16.00 or \$19.00 per month, depending upon the character of the service, for labor performed on a forty (40) hour week basis, the remainder of

the \$30.00 being retained by said Club with the exception of \$3.75 which the War Relocation Authority required the Club to pay such slave as a clothing allowance; that hundreds of the prisoners confined to said camp were thus exploited under this elaborate system of slavery and peonage maintained at said Center, all in violation of the provisions of the 13th and 5th Amendments of the Constitution.

(j) On December 17, 1944, effective as at January 2, 1945, General H. Pratt, Major General, U.S.A., in command of the Western Defense Command and Fourth Army, promulgated Public Proclamation No. 21 which revoked the 108 mass "civilian exclusion orders" theretofore issued by Lt. General John L. DeWitt, his predecessor in said command, and revoked the restrictions theretofore placed upon plaintiffs and all persons of Japanese ancestry affected thereby and said proclamation was an executive judgment and based upon executive findings that none of the persons affected thereby, including the plaintiffs herein, was hostile or dangerous to the security of the United States of America;

On September 4, 1945, said General Pratt, as such military commander, promulgated Public Proclamation No. 24 which rescinded "all Individual Exclusion Orders in Effect" as of that date and removed all military prohibitions against the entry and presence of all persons affected thereby within the West Coast Exclusion Zone, and said proclama-

tion was an executive judgment and based upon executive findings that none of the persons against whom individual exclusion orders theretofore had issued, including any plaintiff herein if any such order prior thereto had issued against him or her, was hostile or dangerous to the security of the United States of America.

Wherefore, plaintiffs pray for the judgment and relief prayed for in the complaint to rescind renunciations herein.

Dated: February 23, 1945.

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

United States of America,
State of California,
County of Modoc—ss.

Harry Uchida, being first duly sworn, deposes and says: that he is one of the plaintiffs in the foregoing Supplement And Amendment To Complaint named; that he is detained at the Tule Lake Center, Newell, Modoc County, California; that he makes this affidavit and verification thereof on his own behalf as such a plaintiff and on behalf of each and all the plaintiffs therein, most of whom likewise are confined and detained at said Tule Lake Center by defendants, and each of whom has authorized him so to do, and because it is impracticable to have the same verified by each of them by reason of the said confinement and detention of each, their large number and the long period of time which would

be required and be consumed to have such done; that he personally knows the facts set forth in said supplement which apply equally to each and all of said plaintiffs; that he has read the foregoing supplement and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ HARRY UCHIDA.

Subscribed and sworn to before me this 24th day of February, 1945.

[Seal] /s/ JOE J. THOMAS,
Notary Public in and for the County of Modoc,
State of California.

My Commission Expires Sept. 20, 1949.

EXHIBIT NO. 2

United States
Department of the Interior
Office of the Secretary
Washington

Aug. 10, 1945

Aug. 6, 1945

Mr. Ernest Besig,
Director, Northern California Branch,
American Civil Liberties Union,
216 Pine Street,
San Francisco 4, California.

My dear Mr. Besig:

This is in further reply to your letters of July 6 and July 17 concerning detentions at Tule Lake for violation of the special project regulations pro-

hibiting Japanese nationalistic activities. We have completed our investigation and in this letter I shall report rather fully our findings and conclusions.

Basically there are, I believe, three points that concern you: (1) the need for and hence the reasonableness of the special project regulations, (2) the apparent lack of any limitations upon the discretion of the Project Director in enforcing the regulations, and (3) an apparent abuse of authority in imposing certain sentences involving minors. I should like to take up each of these points in turn.

1. When Tule Lake became a segregation center, WRA adopted a policy of permitting evacuees to operate Japanese language schools and engage in Japanese cultural activities, in recognition of the fact that many of the residents sincerely desired repatriation to Japan and that their children should be given an opportunity to become acquainted with Japanese culture. Unfortunately this policy was utilized as an entering wedge by a number of strongly pro-Japanese evacuees for the formation of virulently pro-Japanese nationalistic organizations. These evacuees were motivated chiefly by the desire to attain standing in the eyes of the Japanese government and obtain positions of leadership in the colony. To this end they instituted Japanese-type military drill, mass exercises, bugling, wearing of Japanese insignia, emperor worship ceremonials, pro-Japanese demonstrations, and other purely Japanese nationalistic activities designed not to serve any cultural purposes but to instill in the Tule

Lake people a fanatical devotion to the principles of the militarist regime in Japan. By preying on fear of Selective Service they induced parents to exert pressure on their children to join the organizations. In addition they resorted to intimidation, threats of violence and actual violence in coercing residents to join the organizations and participate in their demonstrations. It was primarily due to the pressures of these organizations that over 80 per cent of the citizens eligible to do so applied for renunciation of citizenship this past winter. When Department of Justice representatives arrived at Tule Lake to conduct hearings on applications, the organizations stepped up their demonstrations and their pressures on the applicants. Undoubtedly many of the applicants were in the grip of the emotional hysteria created by these organizations, or actually acting under fear of violence, in confirming their desire to renounce citizenship during the hearings. The general uniformity of the answers given indicated that the applicants were well coached. These facts are reflected in an increasing volume of cancellation requests from Tule Lake renunciants, who frankly state in many cases that they were acting under compulsion in renouncing their citizenship.

On January 19, 1945, Mr. John Burling, special representative of the Attorney General conducting renunciation hearings at Tule Lake, addressed a letter to the heads of the two principal organizations setting forth the position of the Department of Justice toward the activities of the organization.

A copy of that letter is enclosed (Exhibit I). In that letter Mr. Burling, speaking for the Attorney General, strongly condemned the activities of the organizations and stated that they must stop. Despite this letter, which was widely circulated in the center, the activities of the organizations did not abate. In order to maintain peace and order, protect the Tule Lake residents who were loyal to this country or who disagreed with the aims and objectives of the organizations, and to stop the subversive activities of these groups, two steps were taken. One was the transfer of the known alien leaders of the organizations (including persons who had renounced their citizenship) to internment camps. The other was the adoption of the special project regulations prohibiting the overt demonstrations which were fundamental to the organizations' programs.

As a result of these two steps the organizations have lost much of their prestige. Many evacuees who joined the organizations have notified WRA of their withdrawal from membership. Opposition to the organizations has come out of hiding. Nevertheless the influence of the organizations is still strong, and their activities continue. The Director of the War Relocation Authority believes enforcement of the special project regulations is still necessary in order to maintain law and order at Tule Lake and guarantee to the law-abiding residents the right to live in peace and free from fear of violence and recrimination for failure to assert ag-

gressive loyalty to Japanese war aims. In the light of the facts I am unable to disagree with his conclusion.

2. As you state, the special project regulations assign no definite penalty for the prohibited acts. These regulations were, however, issued under and subject to the provisions of WRA internal security regulations applicable to all centers (Exhibit II). These over-all regulations prescribe procedural safeguards with respect to arrests and prompt arraignment and hearing. The right of the accused to counsel is guaranteed and the Project Director is specifically responsible for seeing that a complete case is fairly presented. The maximum penalty that can be imposed by a Project Director for commission of any one offense is imprisonment for not more than three months. In addition, any evacuee may of course carry his case directly to the Director of the Authority if he believes that he has been unjustly dealt with, and during the course of center operations a number of evacuees have done so.

Our investigation has revealed no departure from these over-all regulations by the Project Director in the enforcement of the special project regulations. While the sentence imposed in a number of cases has exceeded 90 days, this has been because more than one offense was committed. We have found no instance in which the sentence imposed exceeded 90 days on any one count. Out of 454 persons apprehended for open violation of the special project regulations, 424 have been released without further

action, after lectures on their behavior. Eleven received sentences ranging from 90 to 270 days. The remainder received sentences of 90 to 360 days, with 60 to 250 days of the sentence suspended on condition that they not violate the regulations after release. It has been the general practice to carry out sentences of imprisonment only in cases where the violator is recalcitrant and states that he will continue to disregard the regulations if released. I believe that these facts reflect sane and considerate handling of this difficult problem.

3. Four recent cases of violation, including the two you mention in your letter of July 6, have involved persons under 18 years of age. Reports on these cases are enclosed (Exhibit III). Despite the youth of the offenders, the facts in the cases do not indicate in my judgment that the sentences imposed were unnecessarily harsh or that the cases could have been handled satisfactorily in some other manner.

None of the four youths involved in these cases has been classified as a detainee of the Western Defense Command or by the Department of Justice. So long as they wish to remain residents of the center they will be required under WRA regulations to serve their sentences. They are, however, free at any time to leave the center even if they are serving a sentence for violation of center regulations. The War Relocation Authority does not maintain that it has power to detain any person who is eligible to leave the center and wishes to do so,

even if he is being disciplined for violation of project regulations. Administrative Notice No. 207, which prescribes this policy, is enclosed (Exhibit IV). I should also point out that the Authority could legally expel any such person from a center, although as a matter of policy this power is exercised only in aggravated cases.

In summary, I am unable to conclude on the basis of our investigation that the special project regulations are unnecessary, that the WRA procedures for enforcement of the regulations are unreasonable, or that the Project Director at Tule Lake has exceeded his authority or been other than temperate under the circumstances in enforcing the regulations. I do not, of course, believe that my judgment should interfere with any action that the American Civil Liberties Union might deem appropriate under the circumstances. I should like to point out, however, that action such as you propose will doubtless be widely publicized. Enemies of the evacuees on the West Coast will undoubtedly play up the activities of the pro-Japanese organizations which will be the basis for the Government's defense. So far as the long run interests of persons of Japanese ancestry in this country are concerned, I think that the contemplated action would be a serious mistake.

Sincerely yours,

/s/ ABE FORTAS,

Under Secretary.

EXHIBIT NO. 3

San Francisco, California.

February 8, 1946.

Hon. Tom C. Clark,
Attorney General of the U. S.,
Washington, D. C.

Hon. Ugo Carusi,
Commissioner, U. S. Immigration & Naturalization
Service,
Philadelphia, Pennsylvania.

Hon. W. S. Cook, Acting Officer-in-Charge,
Fort Lincoln Internment Camp,
Bismarck, North Dakota.

Hon. Abner Schrieber, Assistant Officer-in-Charge,
Sante Fe Internment Camp,
Sante Fe, New Mexico.

Hon. Ivan Williams, Officer-in-Charge,
Sante Fe Internment Camp,
Sante Fe, New Mexico.

Gentlemen:

On January 20th and 21st, 1946, at Fort Lincoln Internment Camp, Bismarck, North Dakota, and on January 29th and 30th, 1946, at the Alien Internment Camp at Santa Fe, New Mexico, pursuant to the requests of the native-born Americans of Japanese ancestry whose names appear on the attached list of names and who are interned in the said internment camps and who had engaged me as their attorney, I appeared at the said camps accompanied by Theodore Tamba, Esquire, an attorney and my assistant, to confer with and advise them concern-

ing the legality of their threatened deportation to Japan by the Attorney General of the United States, their right to have their formal applications for renunciation of United States nationality set aside by court order and their nationality declared and their right to release from the restraint therefore, then and now unlawfully imposed upon them.

Upon my said clients assembling in meeting quarters provided for us by the officers or acting officers in charge of said camps at said times and places I was amazed to learn, by being then and there informed by said officers, that at conferences between an attorney and his clients the rights of interned clients to the assistance of counsel and their rights of privileged communications between them, guaranteed by historical constitutional, statutory and common law provisions, would neither be authorized, countenanced nor allowed and that I would be unable to confer with and advise my said clients unless there was present at all times during such conferences an officer, agent or censor employed by the governmental agency detaining my clients to sit in, spy upon, listen to, eavesdrop and censor what was, may or might have been said or done by us or any of us. I was forced, under the circumstances, to confer with my said clients and advise them as to their legal rights and remedies in the presence of and subject to the surveillance of such officers, agents and censors at said times and places. We were subjected to such mistreatment and viola-

tions of law at said times and places during my said conferences with my said clients albeit I then and there orally objected to and protested the said mistreatment and violations of law to said officers, agents and censors.

We charge that said such mistreatment, deprivations of constitutional, statutory and common law rights to counsel and the prevention of the free exercise of the right of privileged communications existing between an attorney and his clients were unauthorized violations of constitutional statutory and common law rights. We charge that the same constitute additional acts of duress, menace and undue influence exerted by the United States government, acting by and through its agents, servants and employees, under a fictitious color of claim of authority that heretofore resulted in the wrongful internment of my said clients and that accounts for the present restraint imposed upon them and the exaction from them of fictitious applications for renunciation of United States nationality. For the said reasons and upon said grounds, among others, orally stated by me to the officers in charge of said camps and the agents, servants and censors of the government at said times and places, I did and do now object thereto and protest the said violations of due process of law and the deprivations of said constitutional, statutory and common law rights.

Very truly yours,

.....

WAYNE M. COLLINS.

Duplicate originals to:

Hon. Andrew Jordan, District Director, U. S. Immig. & Nat. Service, Dept. of Justice, Post Office Building, Chicago, Illinois.

Hon. Grover C. Wilmoth, District Director, U. S. Immig. & Nat. Service, Dept. of Justice, U. S. Court House, El Paso, Texas.

Hon. Frank J. Hennessy, U. S. Attorney, San Francisco, Calif.

Hon. United States Attorney, Fargo, North Dakota.

Hon. United States Attorney, Bismarck, North Dakota.

Hon. United States Attorney, Santa Fe, New Mexico.

Hon. United States Attorney, Albuquerque, New Mexico.

Hon. C. E. Rhett, Acting Head, War Div., Dept. of Justice, Washington, D. C.

Hon. Edward J. Ennis, as Director, Alien Enemy Control Unit, Department of Justice, Washington, D. C.

Hon. Clifton M. Monroe, Chief Surveillance Officer, Santa Fe Internment Camp, Santa Fe, New Mexico.

Hon. C. M. Uyematsu, Censor-Translator, Santa Fe Internment Camp, Santa Fe, New Mexico.

It is stipulated that the foregoing pleading supplementing and amending the complaint herein be filed herein as such pleading and that service thereof

be deemed to have been made on defendants this 4th day of March, 1946.

TOM C. CLARK,

Attorney General,

FRANK J. HENNESSY,

U. S. Attorney,

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Defendants.

The foregoing Supplement and Amendment to Complaint is hereby ordered filed as such pleading in the above-entitled action this 4th day of March, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Mar. 4, 1946.

[Title of District Court and Cause.]

STIPULATION AND ORDER RE PRO-
DUCTION OF PETITIONERS

It Is Stipulated between the parties hereto that the plaintiffs in this suit who are not released from custody while in Northern California or elsewhere by order of the Attorney General of the United States and who shall be transferred, in custody, for the convenience of the Government, to an internment camp or place of restraint other than the Tule Lake Center, Newell, Modoc County, California,

whether the same be situated in Santa Fe, New Mexico, Crystal City, Texas, or elsewhere, will be produced before the above-entitled Court for hearing or trial purposes in the above-entitled suit, upon reasonable notice, by the United States Government, the Attorney General of the United States, or Ivan Williams as their agent.

Dated: March 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General,
FRANK J. HENNESSY,
U. S. Attorney,
Defendants.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered: March 14, 1946.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Mar. 14, 1946.

[Title of District Court and Cause.]

STIPULATION AND ORDER
EXTENDING TIME

It Is Stipulated between the parties hereto that the time within which the defendants may file their responsive pleadings to the complaint and supple-

mental complaint herein be extended to and including the 15th day of April, 1946, and that the defendants may file a motion to strike Exhibit "2" from the Supplement and Amendment to Complaint to Rescind Renunciations of Nationality herein, if such they be inclined to file, on or by the 8th day of April, 1946.

Dated: March 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General,
FRANK J. HENNESSY,
U. S. Attorney,
Defendants.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered: March 14th, 1946.

.....
U. S. District Judge.

[Endorsed]: Filed Mar. 14, 1946.

In the District Court of the United States for the
Northern District of California, Southern Division

Civil No. 25294

Cons. No. 25294-S

TADAYASU ABO, et al.,

Plaintiffs,

vs.

TOM C. CLARK, Attorney General, et al.,

Defendants.

MOTION TO STRIKE

Defendants move to strike from the Complaint and Amendment and Supplement thereto filed herein certain redundant, immaterial and impertinent matter identified below, pursuant to Rule 8(e) and 12(f) of the Federal Rules of Procedure:

I.

Exhibit 1 to the Complaint as originally filed and Exhibits 2 and 3 to the "Supplement and Amendment to Complaint * * *" herein, comprise evidentiary matter; are impertinent, immaterial and redundant; and, as a result of their inclusion in it, the allegations of the complaint are not simple, concise, and direct as required by the Federal Rules. For these reasons, the three exhibits described, and all references to or discussions of them, should be stricken from the pleadings.

II.

Paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of the "Supplement and Amendment to Complaint * * *" contain allegations evidentiary in character; they and each of them contain matter which is impertinent, immaterial and redundant; and as a result of their inclusion in it the allegations of the complaint are not simple, concise and direct as required by the Federal Rules. For these reasons, all the said paragraphs should be stricken from the pleadings.

III.

Paragraph III, IV, V, VI, VII, and VIII of the First Cause of Action in the Complaint as originally filed contain allegations evidentiary in nature; they, and each of them, contain matter which is impertinent, immaterial and redundant; and as a result of their inclusion in it the allegations of the Complaint are not simple, concise, and direct as required by the Federal Rules. For these reasons, all of the said paragraphs should be stricken from the pleadings.

IV.

Paragraphs I and II of the Second Cause of Action in the Complaint as originally filed incorporate and contain, respectively, allegations evidentiary in nature, and matter which is impertinent, immaterial and redundant. As a result of their inclusion in it, the allegations of the Complaint are not simple, concise and direct as required by the

Federal Rules. For these reasons, the said paragraphs should be stricken from the pleadings.

V.

By reason of the fact that the objectionable matter referred to in paragraphs I through IV herein is inextricably confused and intermingled with the allegations of essential fact in the Complaint and Supplement and Amendment thereto, the Complaint as originally filed and the Supplement and Amendment thereto are themselves rendered impertinent, immaterial and redundant and fail to meet the standard required by the Federal Rules: that they be simple, concise, and direct. For these reasons, the Complaint as originally filed and the Supplement and Amendment thereto should be, and defendants move that they be, stricken.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendants.

Due service and receipt of copy of the foregoing Motion hereby admitted this 15th day of April, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

[Endorsed]: Filed April 15, 1946.

[Title of District Court and Cause.]

ORDER

Defendants' motion to strike

(1) Exhibit 1 attached to the original complaint and exhibits 2 and 3 attached to the supplement and amendment to complaint,

(2) Paragraphs (c), (d), (e), (f), (g), (h), (i) and (j) of the supplement and amendment to complaint and paragraphs III, IV, V, VI, VII, and VIII of the first cause of action in the original complaint is granted.

(3) Defendants' motion to dismiss the original complaint and the supplement and amendment thereto is granted with 20 days within which to amend.

Dated: July 10, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed July 11, 1946.

[Title of District Court and Cause.]

AMENDED COMPLAINT TO RESCIND RENUNCIATIONS OF NATIONALITY, TO DECLARE NATIONALITY, FOR DECLARATORY JUDGMENT AND FOR INJUNCTION

Comes each of the plaintiffs above named complaining of the defendants above named and for cause of action alleges:

I.

This suit arises under the laws and the constitution of the United States and particularly under the provisions of the 14th Amendment of the Constitution and the provisions of Title 8 USCA, sec. 601(a), and Title 8 USCA, sec. 903, and Title 28 USCA, sec. 400, and this court has original jurisdiction to entertain the suit by virtue of the provisions of Title 28 USCA, sec. 41(1), Title 8 USCA, sec. 903, and Title 28 USCA, sec. 400. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars as to each plaintiff.

II.

At all times herein mentioned the following named defendants were and now are the duly appointed, qualified and acting United States Government officers, as follows, to-wit: Tom Clark, the Attorney General of the United States; Frank J. Hennessy, the United States Attorney for the Northern District of California and as such the head of the U. S. Department of Justice in said District; James F. Byrnes, the Secretary of State; John Snyder, the Secretary of the Treasury; Ugo Carusi, the Commissioner of Immigration of the U. S. Immigration and Naturalization Service; Irving F. Wixon, the District Director of and head of the U. S. Immigration and Naturalization Service, Department of Justice, for the Northern District of California; James E. Markham, the Alien Property Custodian; Julius A. Krug, the Secretary

of the Interior; Dillon S. Myer, the Director of the War Relocation Authority; Raymond R. Best, the Project Director of the Tule Lake Center; and Ivan Williams, the Officer-in-Charge of the Tule Lake Center, Newell, Modoc County, California, for the U. S. Department of Justice, Immigration and Naturalization Service.

III.

Each plaintiff is a person of Japanese ancestry and at all times herein mentioned has been and is domiciled in the United States and has been and is a resident of the northern district of California therein; each is a native-born American citizen and national of the United States and subject to the jurisdiction thereof; each is and ever since his or her birth in this country has been and now is loyal and devoted to this country; none of them at any time whatever has been and none is an alien enemy, an alien, or a native, citizen, denizen or subject of Japan or of any hostile or foreign nation, government or country; none at any time has been and none is a danger to the public peace or safety and none at any time has been accorded any hearing by the Government upon any charge or accusation that he or she was or is such a danger and, on the contrary, on December 17, 1944, effective as at January 2, 1945, Major General H. Pratt, U.S.A., the military commander in command of the Western Defense Command and Fourth Army, promulgated Public Proclamation No. 21 which revoked the 108 mass "civilian exclusion orders" thereto issued by Lt. General John L. DeWitt, his

predecessor in said command, and revoked the restrictions theretofore placed upon each plaintiff and all persons of Japanese ancestry affected thereby; and on September 4, 1945, said General Pratt, as such military commander, promulgated Public Proclamation No. 24 which rescinded "all Individual Exclusion Orders in Effect" as of that date and removed all military prohibitions against the entry and presence of plaintiffs and of all other persons affected thereby within the West Coast Exclusion Zone; and each of said public proclamations was an official executive finding, judgment and decision that none of the persons affected thereby, including each plaintiff herein, was hostile or dangerous to the security of the United States of America.

IV.

Each plaintiff, contrary to his or her will and desire, and in violation of the due process of law guaranteed by the 5th Amendment, is unlawfully and unconstitutionally interned and restrained of his or her liberty for the purpose of deportation to Japan by the defendant Ivan Williams as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, situated within the jurisdiction of this Court, at Newell, Modoc County, California, said defendant acting under the order or orders of the Attorney General of the United States; and each now is interned by the defendants and has been and is scheduled for summary removal to Japan, as aforesaid, without prior notice of such removal

having been given each of them by the Attorney General, and each is informed and believes and therefore alleges that said defendants, acting under the orders of said Attorney General and under a claim of color of authority of the Alien Enemy Act, Title 50 USCA, sec. 21, and presidential Proclamation No. 2625, asserts that each, by a purported renunciation of United States nationality in 1945, became an alien enemy and subjected to such internment and removal.

V.

Solely because of his or her Japanese lineage, and unlawfully and in violation of his or her rights, liberties, privileges and immunities guaranteed him or her as a citizen of the United States and as a person subject to its jurisdiction by the 4th, 5th, 6th, 8th, 9th, 13th and 14th Amendments of the Constitution, each plaintiff, by the Government, pursuant to proclamations, commands and orders of General John L. DeWitt, once Commander of the Western Defense Command and Fourth Army, during the year 1942, first was imprisoned in the immediate vicinity of his or her then home situated within the geographical area embraced by the Western Defense Command; then was excluded therefrom and was driven into and imprisoned in a stockade called an Assembly Center; then was transported to and was confined for approximately two years in a concentration camp called a War Relocation Center and thereafter was imprisoned in the Tule Lake Center, Newell, Modoc County, California, said imprison-

ment having been continuous from 1942 to date, in barbed wire enclosures patrolled by armed guards while the Government trained guns upon the internees, all without a charge of crime or accusation of crime having been lodged against any of them and without any hearing having been given them by the Government on the reasons for such treatment; and the Government thereby falsely branded them as disloyal and wrongfully attempted to repudiate them as citizens; and during the early part of 1945, at and while so interned in said Tule Lake Center, each of the plaintiffs, many of whom are infants and a few of whom then were and now are mental incompetents, by reason of said mistreatment signed an application for renunciation of United States nationality, as provided for by Title 8 USCA, sec. 801(i), and Sections 316.1 to 316.9, inclusive, of the Nationality Regulations; none of said applications has been approved by the Attorney General of the United States, and he has not issued an order approving any of them, as is required by Title 8, USCA, sec. 801(i) and Rule 316.7 of the Nationality Regulations, before such becomes effective, and each of said purported renunciations is void and invalid for said reason.

VI.

In the early part of 1945 a hearing was accorded each plaintiff upon such application for renunciation before a hearing officer designated by the then Attorney General of the United States; said hearing was wanting in each and all of the elements of a

fair and impartial hearing, and in the incidents thereof, guaranteed by the 6th Amendment, and deprived each plaintiff of the due process of law guaranteed each by the 5th Amendment in that each plaintiff, by said officer, then and there was deprived of the benefits of independent advice and of the assistance of counsel in and about said hearing, was denied the right to be confronted by any evidence and to examine witnesses against him or her or to produce witnesses in his or her behalf, albeit none of the plaintiffs waived his or her rights thereto, and in that the hearing officer's recommendation to approve each application was made, as was based all subsequent action taken thereon, upon secret information and data which was considered and given controlling weight by the hearing officer but which was withheld, concealed and kept secret from each plaintiff, as provided by the provisions of Section 316.6 of the said Nationality Regulations; and at that time and at all times herein mentioned said Center was patrolled by armed guards and the Government trained guns upon said Center and upon the internees there confined;

The signing of said applications and the hearing held thereon, as aforesaid, was designed by the Government of the United States to cause and result in the detention and deportation of each signer to Japan and of the removal of members of his or her family to Japan and, consequently, to result in their continued detention for an indefinite period of time which was to be followed by a mass banishment of

persons of Japanese descent from the United States, which design and purpose at all times heretofore was withheld and kept secret from the plaintiffs.

VII.

The defendants, and each of them, at all times herein mentioned have detained and now detain plaintiffs, as aforesaid, and have treated and do still treat them as alien enemies, as aforesaid, and have threatened and do still threaten to continue to hold them, and each of them in duress, as aforesaid, and summarily to remove each of them involuntarily and against their will and desire and without their consent from the United States to Japan and the defendants and each of them will continue to detain plaintiffs in said duress and to remove them to Japan, as aforesaid, unless restrained and enjoined from so doing by order of this Court.

VIII.

The said provisions of Title 8 USCA, sec. 801(i), and Sections 316.1 to 316.9, inclusive, of the said Nationality Regulations, and each of said provisions, and each of the aforesaid applications for renunciation executed thereunder and the aforesaid purported renunciations of U. S. nationality by each plaintiff, and the provisions of Title 50 USCA, sec. 21 and 22, are, and each of them is, unconstitutional, void and invalid on its face and also as applied to each plaintiff for each of the following reasons, to-wit. (1) for invading the right of each to be secure in his person, house, papers, and effects

against unreasonable searches and seizures guaranteed by the 4th Amendment; (2) for depriving each of his liberty and property without due process of law guaranteed by the 5th Amendment; (3) for holding each for an unspecified "infamous crime" without a presentment or indictment of a grand jury in violation of the 5th Amendment; (4) for depriving each of his right to a speedy, public, fair and impartial trial and its incidents guaranteed by the 6th Amendment; (5) for inflicting on each a cruel and unusual punishment in violation of the 8th Amendment; (6) for denying and disparaging rights vested in each and retained by the people, in violation of the 9th Amendment; (7) for subjecting each to slavery and involuntary servitude for punishment not for crime upon which convicted but because of type of lineage, in violation of the 13th Amendment; (8) for depriving each of United States citizenship and State citizenship conferred upon each by reason of his birth in the United States by the 14th Amendment, in violations of the 5th and 14th Amendments; (9) for denying and abridging the right of each as a citizen to vote on account of his or her race, color or previous condition of servitude, in violation of the 15th Amendment; (10) for being repugnant to the provisions of Sec. 9 of Art. 1 of the Constitution prohibiting bills of attainder and ex post facto laws; (11) for being contrary to the common defense and general welfare clauses of Sec. 8 of Art. 1 of the Constitution; (12) for being uncertain and for containing an unconstitutional delegation of legislative

power to the Attorney General, in violation of the provisions of Sec. 1 of Art. I of the Constitution; (13) for containing an unconstitutional delegation of judicial power to the Attorney General, in violation of the provisions of Sec. 1 of Art. III of the Constitution; (14) for being contrary to the provisions of Sec. 3 of Art. III of the Constitution defining treason as consisting of levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and forbidding the same; (15) for being contrary to the provisions of Sec. 3 of Art. III of the Constitution prohibiting the working of corruption of the blood or forfeiture for the constructive treason of the remote ancestors of each; (16) for being contrary to the provisions of Subdivision 2 of Art. VI of the Constitution making the Constitution and the 14th Amendment conferring and safeguarding citizenship by birth on each the supreme law of the land; (17) and for depriving each plaintiff of each and all of his aforesaid rights, liberties, privileges, immunities and his implied rights of national and State citizenship as a citizen of the United States and as a person subject to its jurisdiction in violation of the due process clause of the 5th Amendment; and the aforesaid imprisonment, internment, duress in which each plaintiff has been and is held by the Government, as aforesaid, are, and each of said things is unconstitutional, void and invalid for each and all of the aforesaid reasons.

As and for a Second and Separate Cause of Action,

Plaintiffs Allege:

I.

Plaintiffs incorporate herein paragraphs I to VII, inclusive, of their first Cause of Action herein as if fully set forth in this cause of action.

II.

The signing of the renunciation application by each plaintiff was neither under oath nor real nor free nor voluntary but was caused by and was the result of the duress in which each then and there was held by the U. S. Government and the concurrent duress, menace, coercion, fraud, undue influence and intimidation under which each then and there was held and subjected to by the groups and individuals, as hereinafter set forth.

III.

Commencing with their unlawful imprisonment in the vicinity of their homes, as aforesaid, and continuously since then to date, the United States Government, acting by and through the War Relocation Authority, a federal agency, and its agents, servants and employees, and defendants, as the jailor, custodian and guardian of plaintiffs, its wards, in violation of the due process of law guaranteed each plaintiff by the 5th Amendment and in violation of the provisions guaranteed each of them by the 4th, 5th, 6th, 8th, 9th, 13th and 14th Amendments, has unlawfully discriminated against the plaintiffs and each of them and has unlawfully imprisoned them and members of their immediate

families and fraudulently has made and rendered and renders said imprisonment unjustly and unnecessarily prolonged, harassing and oppressive in the following respects, among others, to-wit:—

(a) Shortly following their evacuation, as aforesaid, it demanded of each evacuee a false admission of prior allegiance to Japan and, upon the refusal of any to make such an admission, it incarcerated such person in said Tule Lake Center where it destined such person for detention for an indefinite period of time and for final deportation to Japan; ever since the early part of 1942, it has falsely branded each plaintiff as disloyal and hostile to the United States and has and does wrongfully attempt to repudiate them as citizens simply because of their Japanese ancestry, and said mistreatment engendered hostility to them throughout the nation and created in them a belief and great fear of being relocated in this country where their lives and well-being would be endangered by reason of the existence of said hostility to them; it has continuously deprived plaintiffs and each of them of all of their rights of national and state citizenship; it has failed and refused to accord them or any of them a hearing on the reasons for said imprisonment and treatment; it has regarded, classed and treated each and all of them as being disloyal and as being alien enemies, in 1942 classifying all of them who were eligible for military service as "4-C" under the Selective Training and Service Act of 1940, including those among them who were honorably discharged vet-

erans of this war and those who were and are in the enlisted reserve; in 1942 it denied all of them the right to perform military service for this nation as well as to do work of national importance, exacted their fingerprints from them, photographed them for identification purposes as though they were alien enemies and, by reason of said mistreatment, led them to believe and fear they would be deported to Japan and that if they did not first relinquish U. S. nationality they would, upon arrival in Japan, be mistreated as being persons hostile to Japan; and

(b) At said Tule Lake Center from on or about October 1, 1945, to on or about March 20, 1946, on at least twenty (20) occasions, the said War Relocation Authority interfered with the confidential privileged communication relationship existing between plaintiffs and their counsel herein and denied them their right to counsel by making and publishing recordings of long distance telephone conversations had between plaintiffs in said Center and their counsel in San Francisco; prior to the time of the afore-said renunciation hearings the U. S. Government, through the War Relocation Authority, set up within the limits of said Center, and thereafter until November, 1945, continuously maintained a special jail termed "The Stockade" wherein it incarcerated innocent citizens detained in said Center, without accusation of crime or wrongdoing on their part and without hearings on the cause therefor at any time having been afforded them and without allowing them the assistance of counsel and there held

hundreds of them incommunicado for various periods of time ranging from a few hours to 360 days, all without cause; that said practices were designed to instil and they did instil in the plaintiffs and prisoner-evacuees confined to said Center a great fear of the governmental power wielded over them and said practices were parts and phases of the duress in which the Government held the plaintiffs and all residents of said Center; and

(c) As part of the Government's systematic program of duress in which it held the plaintiffs and all residents in said Center the said War Relocation Authority, in violation of the 13th Amendment, established and maintained for the past four years a slavery and peonage system at said Center, in manner as follows, to-wit:—it organized therein a club known as the "Recreation Club" for the private and personal benefit of the Caucasian employees of said War Relocation Authority to whom membership therein was restricted and through such an instrumentality deliberately exploited hundreds of persons of Japanese ancestry confined to its charge; each member thereof paid to said Club the sum of \$30.00 per month for which the said Club hired out to such member an internee to serve such member in private employment and paid such internee therefor either the sum of \$16.00 or \$19.00 per month, depending upon the character of the service, for labor performed on a forty (40) hour week basis, the remainder of the \$30.00 being retained by said Club with the exception of \$3.75 which the War

Relocation Authority required the Club to pay such slave as a clothing allowance; and said practice was designed to instil and did instil in the plaintiffs and internees there confined a great fear of the governmental power exercised over them and was a part and phase of the aforesaid duress in which they were held; and

(d) Following the commencement of this proceeding, during January and February, 1946, the Attorney General of the United States summarily ordered such plaintiff and renunciant to show cause why they should not be deported by him to Japan and each of them was subjected to such a purported hearing or examination conducted by hearing officers appointed by him; each requested of such hearing officer the right and opportunity to the assistance of counsel and the right to be represented by counsel thereat but each, by him, was denied said rights and was denied reasonable time and opportunity to prepare therefore and to obtain witnesses and evidence in his or her behalf; neither plaintiffs nor witnesses were sworn; the hearings were unduly brief; no adverse evidence was offered against any of them and none was adduced showing or tending to show that any of them was an alien enemy or hostile or dangerous to the security of this country; at said hearings, as also on the review by the Attorney General of the recommendations made by such hearing officers following the conclusion of such examinations, said officers and the Attorney General, in refusing to recommend the now detained

plaintiffs for release from detention and to release them, considered and gave controlling weight to information contained in files and dossiers maintained by said officer, the nature and contents of which were kept secret from plaintiffs, and based such recommendations and refusals upon such secret information and upon mere whim and caprice; said hearings were arbitrary, unreasonable and oppressive in character and were wholly unfair for said reasons and deprived each of them of the due process of law guaranteed each of them by the 5th Amendment and constitute a part and phase of the duress in which each plaintiff has been and is detained by the Government; and

(e) Ever since the conclusion of said hearings the Attorney General, over the protests of plaintiffs and their counsel, and in violation of the provisions of the 4th Amendment and the due process of law guaranteed by the 5th Amendment, has denied and denies plaintiffs their right to counsel and their right of confidential privileged communications by subjecting plaintiffs' mail to their counsel and their counsel's letters to them, to censorship, and by posting censors and eavesdroppers to attend and listen to the consultations and conferences plaintiffs have held with their counsel in connection with this proceeding, and said interference with and denial of said rights is a part and phase of the duress in which the Government has held and holds plaintiffs; and

(f) While holding the plaintiffs in duress, as

aforesaid, the Government, through its agents, servants and employees and the War Relocation Authority, further rendered said imprisonment unjustly and unnecessarily harassing and oppressive by fostering, sponsoring and allowing terroristic groups to operate in said Center and to subject the plaintiffs to the duress, menace, fraud, undue influence, coercion and intimidation practiced upon them by said groups which concurrently caused the said renunciations, as hereinafter alleged;

(g) Since the commencement of this proceeding, the Government has made it a practice to permit aliens to leave said Center and return to their former homes in this country while it holds their children who have signed renunciation applications for involuntary removal to Japan and compels the relocated members of their families, including veterans of this war, to the choice of an involuntary exile from the United States to Japan to accompany them to preserve their family unity or to remain here separated from them;

(h) Neither the Government nor any of its agents, servants or employees has subjected any similarly situated U. S. citizens of other ancestry or extraction to the aforesaid duress or any duress.

IV.

By reason whereof the plaintiffs were led by the Government, to believe and fear and they did believe and fear and had good cause to believe and fear that the Government of the United States classed, treated and viewed them as alien enemies

and that it had repudiated their citizenship and that it desired and intended to deprive and had deprived them of citizenship and of their right to defend this country and that it intended to imprison them for an indefinite period of time and finally to remove and banish them and their families and all like descended persons from the United States to Japan, and that the signing of renunciation applications was a matter commanded by the Government, compliance with which was prerequisite to their right and that of their families to remain united and in the protective security of said Center pending such banishment, and that relinquishment of U. S. nationality by them was necessary to save them from mistreatment in Japan following such banishment, and that it was necessary to save themselves and their families from physical harm and violence which was reigning in civilian communities hostile to persons of Japanese ancestry and which would have been unleashed against them were they or any of them to be restored to civilian life in this country while the war was raging; and

By reasons of said governmental duress, concurrently with the duress, fraud, menace, coercion, undue influence and intimidation practiced upon each plaintiff and members of his or her family by organized terroristic groups, as hereinafter set forth, each plaintiff was kept in a constant state of fear, fright, mass hysteria and terror and was deprived of freedom of will and choice in and about the signing of his or her said application for re-

nunciation and was compelled by the Government against his or her will and desire and without his or her consent to sign a fictitious renunciation of citizenship, as aforesaid.

V.

In the latter part of 1944, at said Center, the War Relocation Authority, a federal executive agency to the charge of which all the evacuees in said Center, including each plaintiff herein, were committed, adopted a policy of permitting and permitted organized groups of internees at said Center to operate Japanese language schools and to engage in and promote Japanese cultural activities therein and, pursuant to said policy, sponsored and fostered said educational and cultural movement; said groups so sponsored and fostered, then and thereafter, until all the renunciation applications herein mentioned had been executed, continuously operated therein with the full knowledge and consent of said agency and under the eyes and surveillance of its officers, agents and employees; said movement developed into an innocuous appearing "innocents front" organization which thereafter, by its organizers and leaders, all of whom were fanatical aliens of Japanese nativity, was converted into a pro-Japanese nationalistic movement; at the time of said renunciation hearings it had developed into and was an active terroristic movement; said groups had as their object and purpose the compelling of each plaintiff and internee in said Center to renounce

U. S. nationality and to be removed to Japan; the real nature, purposes and bent of said movement was concealed from the plaintiffs and its inactive members who had joined it when it appeared to them to be simple educational and cultural movement, as aforesaid, and when its true nature and purpose were not discernible; when the true nature and purposes thereof became apparent many members thereof did not dare to protest the course thereof or openly to resign therefrom because of the coercion of said groups and for fear their own personal security and the security of members of their families thereby would be endangered, and many persons confined to said Center, including a number of the plaintiffs herein, were compelled to join the same as nominal inactive members for like security reasons.

VI.

Said groups engaged in a generalized campaign of lawlessness and terror in said Center prior to and during the time of said renunciation hearings and thereafter and, during said period of time, maintained a veritable rule and reign of terror over plaintiffs, their families and internees residing in said Center and, to accomplish their aforesaid object and purpose, among other things, they preached and practiced sedition; they engaged in engendering, developing and promoting loyalty to the cause of Japan, which cause they notoriously espoused, by initiating Japanese-type military drill, riots, mass exercises, bugling, wearing Japanese insignia, em-

peror worship ceremonials and other purely Japanese nationalistic activities designed to instil in the internees a devotion to the militaristic regime in Japan; they endeavored by word and action, to proselyte to the cause of the enemy the plaintiffs, their families and other loyal internees there residing; they threatend the plaintiffs and internees that if any of them talked to, communicated with or associated with any of the Caucasians in and about said Center those so doing would be assaulted by gangsters and hoodlums commanded by them; they maintained an elaborate system of black-listing and espionage over the plaintiffs and internees in said Center; they threatened plaintiffs that they and their families were classed, treated and regarded by the United States Government as alien enemies and that it had scheduled them and their families for deportation to Japan and that upon arrival in Japan they would be treated as being persons hostile to Japan unless they first had relinquished U. S. nationality; they threatened the plaintiffs, as did governmental announcements publicly made just prior to the time said hearings were held in 1945, that the deportation of each plaintiff and that of alien members of his or her family, on an exchange ship, was imminent and impending and that each would be deported in any event, and that if he or she failed to sign an application for renunciation the security of each and that of members of his or her family, upon arrival in Japan, would be endangered because the leaders of said groups would report them to

the Japanese government as being dangerous alien enemies to Japan and as being American spies and that they there would be seized and punished as such; they threatened them that if any of them succeeded in being relocated in civil walks of life in this country their lives would be placed in jeopardy because of the community prejudice and hostility there reigning against them because of their type of ancestry and informed them that there had been innumerable acts of physical violence perpetrated against persons of like ancestry who had been relocated in civilian communities where hostility to persons of Japanese ancestry was rampant; they sent in spurious letters to the Department of Justice requesting renunciation applications be forwarded to internees whose names they signed to such requests and then informed the receivers of such forms that the government required their renunciations; they maintained and operated schools in said Center to coach and did coach the plaintiff victims of their deceit and coercion into giving false answers to the questions the hearing officers were to propound to them at the renunciation hearings; by threats and by preying on fear of the circumstances in which all internees were held they induced parents to exert pressure on their interned children to join the groups to participate in their demonstrations and to execute renunciation applications; they threatened, coerced and intimidated plaintiffs and all other renunciants into signing such renunciation applications by each and all of the aforesaid means

and by means of threats, displays, exhibitions and overt demonstrations of force and violence and by assaults on internees and by threats against their lives and by threats of inflicting great physical injury upon them and members of their families in the event he or she failed to obey their mandates to sign such renunciation applications.

VII.

The United States Government, by and through the Secretary of the Interior as the head of the War Relocation Authority to whose charge plaintiffs and all internees in said Tule Lake Center were committed by the Chief Executive at the time of said renunciations, through the Hon. Abe Fortas, as the Under Secretary of the Interior, on or about August 5, 1945, proclaimed, made and published in the regular course of his official duties, concerning facts of which he had official cognizance, an official executive finding of fact, judgment, decision and report in writing, that it was primarily due to the duress, fraud, menace, coercion, undue influence and intimidation practiced upon each plaintiff and all renunciants in said Center by the aforesaid groups that caused the renunciation applications to be signed by each of the plaintiffs and all other renunciants therein; and to supply substantial allegations of fact essential to this cause of action each plaintiff alleges that said official executive finding of fact, judgment, decision and report is as follows:

“When Tule Lake became a segregation center,

WRA adopted a policy of permitting evacuees to operate Japanese language schools and engage in Japanese cultural activities, in recognition of the fact that many of the residents sincerely desired repatriation to Japan and that children should be given an opportunity to become acquainted with Japanese culture. Unfortunately this policy was utilized as an entering wedge by a number of strongly pro-Japanese evacuees for the formation of virulently pro-Japanese nationalistic organizations. These evacuees were motivated chiefly by the desire to attain standing in the eyes of the Japanese government and obtain positions of leadership in the colony. To this end they instituted Japanese-type military drill, mass exercise, bugling, wearing of Japanese insignia, emperor worship ceremonies, pro-Japanese demonstrations, and other purely Japanese nationalistic activities designed not to serve any cultural purposes but to instil in the Tule Lake people a fanatical devotion to the principles of the militaristic regime in Japan. By preying on fear of Selective Service they induced parents to exert pressure on their children to join the organizations. In addition they resorted to intimidation, threats of violence and actual violence in coercing residents to join the organizations and participate in their demonstrations. It was primarily due to the pressure of these organizations that over 80 per cent of the citizens eligible to do so applied for renunciation of citizenship this past winter. When Department of Justice representatives arrived at Tule

Lake to conduct hearings on applications, the organizations stepped up their demonstrations and their pressures on the applicants.”

VIII.

By reason of said rule of terror reigning over them and the duress in which each was held each plaintiff believed in and feared said threats of said terroristic groups would be carried into execution against him or her and members of their families and that he or she and his or her family would be exposed to physical violence and probable loss of life if he or she failed to heed said threats and to obey the mandates of said pressure groups and thereby was compelled to sign and did sign said renunciation application against his or her will and desire and without his or her consent.

IX.

At all times during said rule of terror imposed upon the plaintiffs and internees in said Center the United States Government, and its agents, servants and employees in charge of said Center, were aware of and knew of the purposes and activities of said pressure groups and of the duress, menace, fraud, coercion, undue influence and intimidation said groups practiced upon and against plaintiffs, members of their families and other internees there confined, but condoned the same and was responsible for, and actually aided and abetted the same and was accessory thereto by virtue of the facts of having sponsored and fostered the activities of the

aforesaid groups, by failing to prevent and to stop the same, by failing to arrest and prosecute the leaders and active members thereof, by failing to isolate and segregate such criminal elements from the plaintiffs and other loyal internees, by failing to take precautionary measures to prevent such rule of terror, and by failing to protect plaintiffs against said lawlessness and from harm from said sources, and to safeguard their rights as American citizens.

After the aforesaid renunciation hearings had been concluded the U. S. Government seized all the organizers, leaders and active members of the aforesaid pressure groups and forcibly transported them to other internment camps from whence all of them thereafter, since the filing of this proceeding, were voluntarily repatriated to Japan by the Government; the duress, menace, fraud, coercion and undue influence to which said groups subjected plaintiffs did not abate until the last of said groups had been transported, as aforesaid, and did not cease until the last of said group had been repatriated to Japan.

X.

A total of 5,371 native born American citizens of 18 years and upward, included in which number is each of the plaintiffs, executed applications for renunciation of United States nationality at said Center; each of them did so as the direct and proximate result of any by virtue of the duress in which they then and there and for a long period of time prior thereto had been held by the U. S. Government, as aforesaid, and by virtue of the concurrent duress.

menace, fraud, undue influence and coercion of the aforesaid terroristic pressure groups operating therein, as aforesaid, and against which the United States Government, its agents, servants and employees, and particularly the said War Relocation Authority, gave the plaintiffs and said renunciants no protection, as hereinabove alleged.

XI.

That none of said renunciations was real, free or voluntary on the part of any of the plaintiffs, but each was caused by and was the proximate result of fear, fright, torment and terror induced in each plaintiff's mind by virtue of the duress, menace, fraud and undue influence to which each was subjected by the groups and individuals, and the duress in which each was held by the Government, as aforesaid, all of which operated to deprive and did deprive each plaintiff of freedom of choice, will and desire in and about the signing of such application for renunciation, and each of said renunciations was and is false, fictitious, null and void by reason thereof.

XII.

Prior to the time of the filing of this complaint each plaintiff, twice in writing, notified the Attorney General of the United States, his agents and representatives, and the defendants of the aforesaid duress which caused him or her to sign such renunciation application and that he or she rescinded, revoked and cancelled his or her said application for renunciation and purported renunciation of United

States nationality for the reasons that the same was signed under duress, menace, fraud, coercion, undue influence and mistakes of fact and of law, as aforesaid, and informed him and them of the grounds and reasons on which said rescission and revocation was based and made but said Attorney General failed and still does fail to accept said rescission and revocation; in each of said notifications each plaintiff demanded of him and them, that he or she be discharged from said internment, detention and unlawful restraint upon his or her liberty, but the Attorney General of the United States, his agents and representatives, and the defendants failed and refused and do still fail and refuse to release each and all of said plaintiffs from said internment, duress, restraint and threatened deportation to Japan.

XIII.

The written orders, records and documents pertaining to each of the plaintiffs in connection with the matters and things set forth in this complaint are in the exclusive possession, custody and control of the defendants and the Department of Justice; neither the plaintiffs nor any of them know the nature or contents thereof and none of them has had and none now has access thereto and the same never have been made available to plaintiffs or any of them or to their counsel and the same are now withheld from each of them and their counsel by the defendants and said Department of Justice.

As and for a Third and Separate Cause of Action, Plaintiffs Above Named as Minors Allege:

I.

Plaintiffs incorporate herein paragraphs I, II, III, V and VI of their first cause of action herein, and paragraph XII of their second cause of action herein as if fully set forth in this cause of action.

II.

That each of the plaintiffs named in this cause of action was either under the age of twenty-one (21) years at the time of signing of said renunciation applications, or a mental incompetent at said time, said plaintiffs including the minors and mental incompetent plaintiffs appearing herein by next of friend and guardian ad litem and including many other plaintiffs who then were minors who since said time have attained their majority; and by reason of the said incapacity of said plaintiffs at the time of signing said renunciation applications and also by reason of the aforesaid rescissions and disaffirmances by them and each of them said alleged renunciations are of no legal effect whatsoever and said plaintiffs are still citizens and nationals of the United States and are not subject to the aforesaid internment, detention, duress and deportation to any foreign country.

Wherefore, the plaintiffs, and each of them, pray for a temporary restraining order and for an injunction pendente lite and for a permanent injunction prohibiting defendants, and each of them, their agents, servants, employees and representatives, and each of them, from removing or deporting plaintiffs or any of them from the United States to Japan

or to any foreign country, or from taking any steps in furtherance thereof, pending the final judgment in this suit; that his or her said application for renunciation of United States nationality be ordered to be delivered up and cancelled and be declared null, void and of no effect; that any approval thereof made by the defendant Attorney General of the United States or order issued by him approving the same, if any ever was made, be cancelled and be declared null, void and of no effect; that it be declared and adjudged that he or she is not an alien enemy; that he or she be declared to be a national of the United States and a citizen thereof; that it be adjudged and decreed that he or she is a native-born citizen and national of the United States; that it be adjudged and decreed that his or her internment, detention and duress in which held is illegal and void and that each be ordered released therefrom; that any and all orders for his or her removal or deportation be ordered cancelled; for an order and judgment declaring his or her rights in the premises; that each have his or her costs of suit; and that each have such other and further relief as may be just.

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

United States of America,
State of California,
City and County of San Francisco—ss.

Masaru Yamaichi, being first duly sworn, deposes and says: That he is one of the plaintiffs in the

foregoing amended complaint named; that he makes this affidavit and verification thereof on his own behalf as such a plaintiff and on behalf of each and all the plaintiffs therein, each of whom has authorized him so to do, and because it is impracticable to have the same verified by each of them by reason of their detention, their large number and the long period of time which would be consumed to have such done and because of the shortness of time due to the threatened and imminent involuntary removal of plaintiffs, as alleged therein; that he personally knows the facts set forth therein which apply equally to each and all of said plaintiffs; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ MASARU YAMAICHI.

Subscribed and Sworn to before me this 15th day of August, 1946.

[Seal] /s/ JANE M. DOUGHERTY,
Notary Public in and for the County of San Francisco, State of California.

My Commission Expires Sept. 24, 1949.

Service of and receipt of copies of the above and foregoing amended complaint is hereby admitted and

acknowledged this 15th day of August, 1946, by each of the defendants.

TOM C. CLARK,

Attorney General.

FRANK J. HENNESSY,

U. S. Attorney.

Defendants.

By: /s/ R. B. McMILLAN,

Assistant U. S. Attorney.

Attorneys for Defendants.

[Endorsed]: Filed Aug. 15, 1946.

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTIES
DEFENDANT

Upon reading and filing the written stipulation to the substitution of certain parties defendant executed between the parties hereto,

It Is Ordered that John Snyder, as the Secretary of the Treasury, be substituted herein as a party defendant in the above-entitled suit in lieu of and as the successor in office to Fred Vinson, the former Secretary of the Treasury, and that Julius A. Krug, as the Secretary of the Interior, be substituted as a party defendant in the above-entitled suit in lieu of and as the successor in office to Harold Ickes, the former Secretary of the Interior.

Dated: August 16, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Aug. 16, 1946.

[Title of District Court and Cause.]

STIPULATION TO SUBSTITUTION
OF PARTIES DEFENDANT

Whereas the defendant Fred Vinson has ceased to hold office as the Secretary of the Treasury and the present Secretary of the Treasury now is John Snyder, and whereas the defendant Harold Ickes has ceased to hold office as the Secretary of the Interior and the present Secretary of the Interior is Julius A. Krug, and whereas said defendants were sued herein as public officers in their official governmental capacities,

It Is Stipulated between the parties hereto that John Snyder, as the Secretary of the Treasury, be substituted herein as a defendant in lieu of and as the successor in office of said Fred Vinson, and that Julius A. Krug, as the Secretary of the Treasury, be substituted herein as a defendant in lieu of and as the successor in office of said Harold Ickes.

Dated: August 15, 1946.

TOM C. CLARK,

Attorney General,

FRANK J. HENNESSY,

U. S. Attorney,

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Defendants.

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 16, 1946.

[Title of District Court and Cause.]

MOTION TO STRIKE

Defendants move to strike from the amended complaint filed herein certain redundant, immaterial and impertinent matters identified below, pursuant to Rules 8(e) and 12(f) of the Federal Rules of Civil Procedure:

All of the matters and allegations set forth in Paragraph VII of said amended complaint, beginning with line 30, page 17, to and including line 10, page 19: on the ground that said allegations and matters comprise evidentiary matter; are impertinent, immaterial and redundant; and, as a result of their inclusion in it, the allegations of said amended complaint are not simple, concise, and direct, as required by said Federal Rules.

That said matter constituted Exhibit No. 2, ap-

pended to the "Supplement and Amendment to Complaint" filed herein and ordered stricken by this Court on July 10, 1946.

For these reasons, said Paragraph VII, and the whole thereof, of said amended complaint should be, and defendants move that same be, stricken.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Defendants.

[Endorsed]: Filed Sept. 19, 1946.

[Title of District Court and Cause.]

ANSWER

Respondents Tom C. Clark, Frank J. Hennessy, and Irving F. Wixon make the following answers to the Amended Complaint filed herein.

I.

Respondents neither admit nor deny the conclusions of law contained in Paragraph I of the Amended Complaint, but admit the statement of fact that the matter in controversy exceeds the sum of three thousand dollars as to each complainant, exclusive of interest and costs.

II.

Respondents admit the allegations of Paragraph II insofar as they apply to Respondents Clark,

Hennessy and Wixon. With respect to the allegations as to other Government officials, it is admitted that the individuals named were at certain times or are now occupants of the positions stated, although some of them were not such occupants at all times mentioned in these pleadings. Moreover, Respondents Clark, Hennessy and Wixon assert that no defendants other than themselves have been effectively served herein and none has appeared, and therefore any allegations with respect to such individuals are not relevant to the cause herein set forth.

III.

Respondents admit that each complainant is a person of Japanese ancestry, a native, domiciliary of the United States, and a resident of the Northern District of California. Respondents further admit that the proclamations mentioned in Paragraph III of the Amended Complaint herein were issued and were withdrawn, as stated therein. Respondents assert that each complainant is an alien and a citizen and subject of Japan, and that the Attorney General has made a finding of dangerousness as to each complainant, acting within his powers pursuant to the Alien Enemy Act of 1798 and to Presidential Proclamations 2525 and 2655 and to the 12189). Respondents deny that each or any of complainants is presently a citizen or national of the United States or is loyal to the United States, that the withdrawal of the Proclamations set forth in

Paragraph III of the Amended Complaint had the effect of a finding that complainants herein were not hostile or dangerous to the security of the United States of America; and deny all other allegations of Paragraph III not otherwise answered herein.

IV.

Respondents admit that each of complainants is interned in the custody of Respondent Irving F. Wixon, acting in his capacity as District Director of the Immigration and Naturalization Service for the Northern District of California, who is, in turn, acting under the direction of Respondent Tom C. Clark, Attorney General of the United States; and that each is held under order of removal from the United States issued by said Respondent Tom C. Clark, acting lawfully pursuant to the Alien Enemy Act of 1798 and the Presidential Proclamations and the Regulations of the Attorney General cited above; but deny all other allegations and conclusions of Paragraph IV of the Amended Complaint herein.

V.

Respondents admit that all of complainants were excluded from the Western Defense Command area in 1942, and, at the time of their renunciation of citizenship, were detained in the War Relocation Center known as Tule Lake, at Newell, California, which was surrounded by wire and guarded; but deny the remaining allegations of Paragraph V of the Amended Complaint filed herein; and assert

that the renunciation of each of complainants was in fact approved by the Attorney General, as required by statute and regulation; and that each of said renunciations is valid and legally effective.

VI.

Respondents admit that hearings were given to each complainant pursuant to the requirement of the statute and regulations; but assert that said hearings were conducted fairly and in conformity with Constitutional requirements, and assert that the purpose of the hearings given was, first, to ensure that each applicant for renunciation fully understood the nature and consequences of his act and undertook them voluntarily, and, second, to ascertain, pursuant to statutory requirement, whether approval of the attempted renunciation in each case would be not contrary to national defense; and assert that such approval was not based on any information, secret or other, except what was voluntarily disclosed to the hearing officer by the applicant in the applicant's effort to obtain approval of his renunciation. Respondents deny all other allegations of Paragraph VI of the Amended Complaint filed herein.

VII.

Respondents admit the allegations of Paragraph VII of the Amended Complaint filed herein except insofar as they may be taken to draw the legal conclusion that complainants are or were subjected to duress in relation to their renunciation, or in

any other connection. The existence of such duress is denied.

VIII.

Respondents deny all allegations and conclusions in Paragraph VIII of the Amended Complaint filed herein.

And, Answering the Second Cause of Action, set forth in the Amended Complaint herein, Respondents Tom C. Clark, Frank J. Hennessy and Irving F. Wixon respectfully submit as follows:

IX.

Respondents reiterate the pleadings set forth in Paragraphs I to VII in the above Answer to the First Cause of Action herein.

X.

Respondents deny all the allegations of Paragraphs II, IV, and VIII of the Second Cause of Action in the Amended Complaint.

XI.

Respondents admit sub-section (h) of Paragraph III of the Second Cause of Action in the Amended Complaint; and assert that neither the Government nor any of its agents, servants or employees has subjected complainants herein to the duress alleged, or to any duress. Respondent denies all other allegations of said Paragraph III, with the exception of the following: Respondents admit that complainants have been detained at Tule Lake, and that each of them, since his renunciation and subsequent

hearing and order by the Attorney General, has been destined for removal to Japan. Respondents admit that in various sections of the country there existed hostility to complainants and other persons in the Tule Lake Center during their detention, and that, in consequence, many residents of the said Center were apprehensive of being relocated during the time prior to the unconditional surrender of the Japanese Government. Respondents admit that, for some time following the declaration of war, complainants and other persons in relocation centers were not accepted or drafted for service in the United States armed forces; and admit that complainants were finger-printed and photographed for identification. Respondents assert that at a later period numerous individuals in the said relocation centers were, in fact, accepted for service in the armed forces and were called upon to perform other important services in the national war effort. Respondents admit that, since the entry of orders of removal by the Attorney General, surveillance was maintained over communications between complainants and persons not confined in the Center; and admit that there was maintained within the Center a disciplinary enclosure in which persons disturbing the orderly conduct of the said Center were from time to time detained. Respondents admit that there was in said Relocation Center a club of Caucasian employees of the said Center through which the said Caucasian employees employed, on a voluntary basis, individuals detained at the Center at the rates

prescribed for remuneration of such occupants of the said Center for all labor performed therein. Respondents admit that each of complainants, following his renunciation, was afforded an opportunity to show cause why he should not be removed to Japan; and assert that, at the hearings provided for the purpose of permitting cause to be shown, each complainant was given full opportunity to present such evidence as he wished.

XII.

Respondents admit that, as alleged in Paragraph V of the Second Cause of Action in the Amended Complaint herein, the War Relocation Authority permitted the organization of groups of persons within the said Center for the purpose of operating Japanese language schools and promoting Japanese cultural activities therein; and admit that some of the said organizations and the leaders thereof were adherents of nationalistic Japanese philosophy. All other allegations of the said Paragraph V are denied.

XIII.

Respondents admit that the organizations referred to in Paragraph XII, above, engaged in engendering, developing and promoting loyalty to the cause of Japan, initiated Japanese-type military drill, mass exercises, bugling, wearing Japanese insignia, emperor worship ceremonials and other Japanese nationalistic activities designed to instill in the residents of the Center a devotion to the

militaristic regime in Japan. Respondents admit that these organizations engaged in misrepresentations with respect to the purpose and effect of the deportation and renunciation laws and the programs initiated by the Government thereunder, and engaged in a propaganda campaign the purpose of which was to persuade persons within the Relocation Center to renounce their American citizenship and assert their loyalty to the Japanese Government. Respondents admit that certain alien parents within the Relocation Center, both as a result of the activities of these organizations and for other reasons, attempted to persuade and in some instances did persuade their citizen children to renounce their citizenship. All other allegations of Paragraph VI of the Second Cause of Action in the Amended Complaint are denied.

XIV.

This Court's decision, that the letter set forth in Paragraph VII of the second cause of Action in the Amended Complaint herein should be stricken as being improperly pleaded, renders unnecessary any response to said Paragraph VII.

XV.

Respondents deny all the allegations of Paragraph IX of the Second Cause of Action in the Amended Complaint, and specifically deny the existence of duress, menace, fraud, coercion and undue influence on the part of the Government or otherwise at any time.

XVI.

Respondents admit that 5,731 United States born individuals executed applications for renunciation of citizenship, among them complainants, but deny the other allegations of Paragraph X of the Second Cause of Action in the Amended Complaint.

XVII.

Respondents deny all the allegations of Paragraph XI of the Second Cause of Action in the Amended Complaint.

XVIII.

Respondents admit that complainants made the allegations set forth in Paragraph XII of the Second Cause of Action in the Amended Complaint, and attempted to revoke their renunciations as there stated; but assert that the failure and refusal to accept the attempted revocation there alleged was necessitated by law, there being no power in the Attorney General to confer citizenship on persons who have lost it. Respondents admit, also, refusal to release complainants and assert that they will be removed to Japan pursuant to the orders of the Attorney General legally issued in their cases, as set forth above.

XIX.

Respondents admit the allegations of Paragraph XIII of the Second Cause of Action in the Amended Complaint, with the exception that complainants or their counsel have access to the orders issued in the respective cases upon request, and that

certain other documents may, within the discretion of authorized officials, be made available upon proper request.

XX.

And, Answering the Third Cause of Action Set Forth in the Amended Complaint Herein, Respondents reiterate the answers set forth above, admit that most of the complainants in this Cause of Action were minors at the time of renunciation, but deny that any were mentally incompetent or that the act of renunciation was without effect as to any either because of infancy or other incompetence.

XXI.

And, as an Affirmative Defense to All Three Causes Set Forth in the Amended Complaint Herein, Respondents Assert:

First, that renunciations were approved by the Attorney General only after the following procedural steps:

1. A written application for permission to renounce, signed by the prospective renunciant, was required to be filed in each case.

2. The submission of a formal statement of renunciation, upon which a hearing was held by an officer specially designated by the Attorney General prior to its approval.

3. Approval by the Attorney General based upon the report and recommendation of such hearing officer.

Second, at these hearings each renunciant appeared in person before the designated hearing

officer in a private interview at which no other persons of Japanese ancestry were permitted to be present, except in cases where an interpreter was required.

Third, that it was the purpose of these hearings to make certain that the prospective renunciant fully understood the consequences of his act and undertook them voluntarily. To this end the officers were instructed to and did explain in full that citizenship once lost could not be regained, and interrogated each prospective renunciant as to his reasons for wishing to renounce, explaining, in cases where such explanation seemed appropriate, that renunciation was not necessary in order to preserve family unity or in order to obtain an opportunity to depart for Japan.

Fourth, that a very large number of the complainants herein were, at the time of renunciation, themselves members of the nationalistic Japanese organizations described in the above Amended Complaint and Answer thereto. That a very large number of complainants herein affirmatively asserted their belief in the principles and purposes of the said nationalistic organizations before the renunciation hearing officer at the hearing held under the conditions described above. That a very large number of complainants when appearing at such hearing openly avowed hostility to the United States and asserted their hope and desire for a Japanese victory. That a considerable number of complainants appeared before the hearing officers wearing

garments comprising the uniform of the said nationalistic organizations, and performed parts of the ritual before the hearing officer.

Fifth, that, as indicated in the description of the procedures above, each of the complainants has individually filed a petition to be permitted to renounce, and that a not inconsiderable number of them wrote twice or more to the Attorney General complaining that their wishes in this respect were not granted more expeditiously.

Sixth, that a large proportion of complainants expressed the desire to leave the United States and reside permanently in Japan as a reason for their intention to renounce United States nationality.

Seventh, that a very large proportion of complainants herein made no attempt to retract their said renunciations until after the Atom Bomb had fallen on Japan and they had been apprised of the consequent surrender.

Eighth, accordingly, Respondents assert that, contrary to the allegations of complainants, complainants were not in fact coerced or led by any form of duress to renounce their citizenship as aforesaid, but in truth and in fact were voluntary and active participants in the movement for renunciation, and themselves renounced voluntarily and with full knowledge of the nature and consequences of their act.

Wherefore, Respondents respectfully submit the Complaint should be dismissed on the merits.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

JOHN F. SONNETT,

THOMAS M. COOLEY, II,

Department of Justice.

ROBERT B. McMILLAN,

Asst. U. S. Attorney.

Due Service and receipt of copy of foregoing answers hereby admitted September 23, 1946.

/s/ W. M. COLLINS,

Attorney for Plaintiffs.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

ORDER APPOINTING GUARDIAN AD LITEM

Good cause appearing therefor, it is hereby ordered that the plaintiffs herein, Frank Shimada, Yoshiko Shinde and Kaoru Tsuneshige, each of whom is a mental incompetent, be and each of them is hereby authorized to appear herein by Harry Uchida as his or her next of friend and guardian ad litem of each of them.

Dated: September 30, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

Receipt of a copy of the above order is hereby admitted this 30th day of September, 1946.

TOM C. CLARK,

Attorney General,

FRANK J. HENNESSY,

U. S. Attorney,

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Defendants.

[Title of District Court and Cause.]

MOTION TO STRIKE

Each plaintiff moves the court to strike the following matter from the Answer herein, as follows:

1. From paragraph III thereof, the assertion on page 2 line 11, commencing with the words "Respondents assert" down to and including the words and figures "thereunder (10 F.R. 12189)" on line 16 of page 2, on the grounds the said matter is in irreconcilable conflict and inconsistent with the admission of the nativity, residence, domicile and presence in the United States of each plaintiff is an erroneous opinion and conclusion of law, is irrelevant and is sham, frivolous and evasive.

2. From paragraph III thereof, the concluding sentence thereof commencing with the words "Respondents deny" on line 16 of page 2, on the grounds said matter constitutes mere opinions and conclusions of law, is negative pregnant, and is sham, frivolous and evasive.

3. From paragraph IV thereof, the phrase commencing with the words "acting lawfully" on line 1 of page 3 down to and including the words "cited above" on line 3 of said page, on the ground the same is mere opinion and conclusion of law.

4. From paragraph V thereof, the matter commencing with the words "as required by statute" on line 13 of page 3 down to and including the word "effective" on line 15 of said page, on the ground it contains mere opinions and conclusions of law.

5. From paragraph XI thereof, the matter commencing with the words "and assert that neither" on line 27 of page 4 down to and including the words "or to any duress" on line 29 of said page, on the ground the same is in conflict and inconsistent with matters of fact of which the court has and takes judicial cognizance.

6. The whole of paragraph XIV thereof, for being an erroneous opinion and conclusion of law and as being evasive.

7. From paragraph XVIII thereof, the matter commencing with the words "but assert that the failure" on line 21 of page 7 down to and including the words "on persons who have lost it" on line 24 of page 7, on the ground the same is a mere opinion and conclusion of law, and is immaterial, irrelevant and evasive.

8. The whole of paragraph XXI thereof, except subsection "Second" on the grounds it does not constitute either a special or an affirmative defense, contains mere opinions and conclusions of law, re-

lates to evidentiary matter, is redundant, immaterial, irrelevant, sham and evasive.

9. The whole of the following paragraphs thereof, to-wit, paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, and the whole of said Answer on the grounds the denials and admissions therein do not explicitly traverse the material allegations of the amended complaint; that the denials therein involve conclusions of law; that the denials therein are of matters of fact of which the defendants are presumed to have and have actual knowledge and, consequently, cannot be heard to deny; that the matters and things alleged in the amended complaint are matters of fact of which the court has judicial knowledge or takes judicial cognizance and, in consequence, are matters of fact that cannot be denied by defendants; that the admissions in said answer are inconsistent with the denials therein; that the denials therein are inconsistent with the admission therein; that the denials therein are inconsistent with facts of which the court takes judicial cognizance; that the denials are vague, indefinite, uncertain and evasive; that the admissions therein are indefinite, uncertain and evasive; that the denials and admissions and assertions therein and the whole of answer are sham, false, frivolous, impertinent and evasive.

This motion is made upon the amended complaint, the answer thereto, this motion and notice of this motion.

Wherefore, each plaintiff prays this motion to strike be granted; that leave to amend the answer be denied; that each plaintiff have the relief prayed for in the amended complaint.

Dated: October 10, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Each plaintiff moves the court for summary judgment in his favor as prayed for in the amended complaint herein.

This motion is made upon the grounds that: (1) the defendants' Answer does not present any material issue of fact for determination; (2) the material issues of fact alleged in the amended complaint are either undenied or admitted in said Answer or are facts the existence and truth of which the Court has or takes judicial cognizance, in consequence of which the defendants are barred from denying the truth of the allegations of fact contained in said amended complaint and (3) the questions of fact must be resolved in favor of plaintiffs.

This motion is made and based upon the amended complaint, the answer thereto, this motion and notice of the hearing thereof, supporting affidavits to

be filed herein, facts of which the Court takes judicial cognizance and stipulations of fact into which the parties will enter on the submission of said motion to this Court for adjudication.

Dated: October 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

Points and Authorities in Support of Motion

1. A summary judgment in equity is authorized by Rule 56(a) R.C.P.

2. There is no genuine issue raised by the Answer as to any material fact alleged in the amended complaint and, in consequence, plaintiffs are entitled to summary judgment in their favor as a matter of law.

3. Inasmuch as the Answer does not controvert any material issue of fact and the evidence, as supplied by stipulations of fact, admissions, and facts of which the Court takes judicial cognizance, reveals that the defendants have not and cannot deny the material facts alleged in the amended complaint a summary judgment in favor of the plaintiffs is authorized by Rule 56(a) and 56(c) R.C.P. and should be granted plaintiffs.

Respectfully submitted,

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

Receipt of a copy of the foregoing Motion, Notice thereof, and Points and Authorities in support

thereof is hereby admitted this 14th day of October, 1946.

TOM C. CLARK,
Attorney General,
FRANK J. HENNESSY,
U. S. Attorney,
By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 14, 1946.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON
THE PLEADINGS

Each plaintiff moves the court for judgment on the pleadings herein as prayed for in the amended complaint herein.

This motion is made upon the grounds that: (1) the defendants' Answer does not present any material issue of fact for determination; (2) the material issues of fact alleged in the amended complaint are either undenied or admitted in said Answer or are facts the existence and truth of which the Court has or takes judicial cognizance, in consequence of which the defendants are barred from denying the truth of the allegations of fact contained in said amended complaint and (3) questions only of law are involved and these must be resolved in favor of plaintiffs.

This motion is made and based upon the amended complaint, the answer thereto, this motion and notice of the hearings thereof, facts of which the Court takes judicial cognizance and stipulations of fact into which the parties will enter on the submission of said motion to this Court for adjudication.

Dated: October 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 14, 1946.

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTIONS

To Defendants and to Hon. Tom C. Clark, Attorney General, and Hon. Frank J. Hennessy, U. S. Attorney, Attorneys for Defendants:

You and each of you will please take notice that on Monday, October 28, 1946, at the hour of 10 o'clock a.m. of said day or so soon thereafter as counsel can be heard, plaintiffs will move the court to grant their motions to strike, for judgment on the pleadings and for summary judgment which heretofore were filed herein.

Dated: October 16, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

Receipt of a copy of the above notice is hereby admitted this 16th day of October, 1946.

TOM C. CLARK,

Attorney General,

FRANK J. HENNESSY,

U. S. Attorney,

Defendants,

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Defendants.

[Endorsed]: Filed Oct. 16, 1946.

[Title of District Court and Cause.]

RESPONDENTS' POINTS AND AUTHORITIES IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

B.

Respondents move for a Summary Judgment in their favor.

I.

The affidavits hereto attached and the authorities heretofore cited establish that Complainants' renunciations are not vitiated by duress or otherwise.

It Is Therefore respectfully submitted that Complainants' Motion for Summary Judgment must be

denied and Respondents' Motion for Summary Judgment be granted.

/s/ FRANK J. HENNESSY,

United States Attorney.

Attorney for Respondents
in Equity.

AFFIDAVIT OF JOHN L. BURLING

District of Columbia— ss.

John L. Burling, being sworn, deposes and says as follows:

I am a member of the bar of the State of New York and of the Supreme Court of the United States. From July 1, 1939, until June 3, 1946, I was employed by the United States Department of Justice. At all times relevant to this suit I was assigned to the Alien Enemy Control Unit of the War Division of the Department of Justice, and during substantially all of the relevant period I had the title of Assistant to the Director of that Unit. The Alien Enemy Control Unit had assigned to it not only the administration of the Alien Enemy Act of 1798 but also cognate matters relating to the internal security of the United States and to exceptional wartime security controls. At all times from January, 1942, until the surrender of Japan, the Unit was active for the Department of Justice in problems relating to Japanese aliens resident in the United States and to American citizens of Japanese ancestry resident before the war on the West Coast. From January, 1942, when agitation in favor of evacuation of all persons of Japanese

ancestry arose on the West Coast, onward, I was active in the Department of Justice in dealing with the various problems to which that agitation led, including the ultimate removal from the West Coast by military authorities of all persons of Japanese ancestry. The Department of Justice and, through it, I, personally, was aware of substantially all of the governmental developments and the policy determinations leading to that evacuation and to the creation of the War Relocation Authority. Thereafter, I was one of the officials of the Department of Justice who was most closely in touch with the officials of the War Relocation Authority and who sought to coordinate the activities of the Department of Justice with that agency where appropriate. It may be said, in general, that I am thoroughly familiar with the problems created by the evacuation and particularly with the problems related to internal security, many of which problems arose especially at the Tule Lake Center of the War Relocation Authority located in Modoc County, California.

Subsection (i) of Section 401 of the Nationality Code which authorizes renunciation of American citizenship under certain circumstances was added to the Nationality Code of 1940 by Act of July 1, 1944. The enactment of that law came about under the following circumstances:

In the early winter of 1943, coupled with an effort to recruit combat teams of American citizens of Japanese ancestry to serve with the armed forces,

the War Relocation Authority undertook to have a questionnaire or questionnaires filled out by a large number of the residents of its ten centers into which the very great majority of persons of Japanese ancestry previously residing on the West Coast had been moved. This questionnaire included questions relating to loyalty to the United States on the part of both aliens and citizens. Due probably in part to the manner in which the questionnaire was handled both by military authorities and by officials of the War Relocation Authority and probably in part to distress at having been moved into guarded, barbed-wire-enclosed camps and probably in part to genuine loyalty on the part of some toward Japan, a considerable number of persons, both citizens and aliens, either answered the questions pertaining to loyalty in the negative or declined to answer.

Thereafter, in the spring of 1943, the War Relocation Authority encountered unfavorable publicity in certain sections of the press. At the same time a subcommittee of the House Select Committee to Investigate Un-American Activities conducted an investigation into the policies of the War Relocation Authority. In the course of this investigation and in the press the War Relocation Authority was very strongly urged to segregate those whom it deemed disloyal to the United States from those whom it deemed loyal. The preparation for this segregation process was carried on in the spring and summer of 1943. Very generally, it may be

said that those persons who had answered the loyalty question above referred to in the negative and who failed subsequently to withdraw their negative answer and to substitute an affirmative answer were scheduled for segregation. Similarly, persons who requested to be repatriated to Japan were scheduled for segregation. A small number of others as to whom there was specific security information provided by one or more Government agencies or who failed to persuade the War Relocation Authority of the genuineness of their amendment to the negative answer to the loyalty questionnaire were scheduled for segregation. The very great majority of all persons designated for segregation, however, received such designation as a result of either a negative loyalty answer or a request for repatriation. In addition to adults selected for segregation, minor children of segregants and family members of segregants who desired to remain in the family unit were permitted to be segregated.

Prior to the completion of the preparation of lists of persons designated for segregation, the War Relocation Authority announced that the Tule Lake Center in Modoc County, California, which was at that time one of the Authority's ten relocation centers, would be selected as the segregation center. Inasmuch as many of the persons of Japanese ancestry who had been moved by the Army first from their homes to Army camps and then from Army Camps to War Relocation Authority centers re-

garded such movement as an exceptional hardship, a considerable number of persons who had already been moved to the Tule Lake Center in 1942 did not desire to move to another Center in the process of transforming the Tule Lake Center from a relocation center to a segregation center and, therefore, desired to remain there notwithstanding their knowledge that the Tule Lake Center was to become the segregation center for persons of Japanese loyalty. The precise number of persons who would not have been segregated by the War Relocation Authority's criteria who remained in Tule Lake because of unwillingness to move is not known but it was thought to be slightly more than 6000.

In general, therefore, it may be seen that few of the persons segregated were segregated against their will. Segregants had ordinarily elected that status either by giving and adhering to a negative loyalty answer or by making and not withdrawing a request for repatriation or by refusing to leave Tule Lake when the status of that center was changed. It was announced throughout all centers at the time of segregation that the principal purpose of the War Relocation Authority would be to relocate in American life the evacuees who were not segregated but that it was not intended that any relocation be carried on directly from the Tule Lake Center (although in some exceptional cases persons in the Tule Lake Center might be moved to relocation centers for further processing.) The

general spirit in which segregation was carried on both by the War Relocation Authority and by the evacuees themselves was that those persons of Japanese ancestry, whether United States citizens or aliens, who desired to look to the United States for their future, should remain in or go to one of the nine relocation centers, while those persons of Japanese ancestry, whether United States citizens or aliens, who desired to look to Japan for their future, should go to the Tule Lake Segregation Center until exchanged or repatriated.

In 1942 and again in 1943 the exchange vessel *Gripsholm* made voyages between the United States and neutral ports at which exchanges took place of Japanese returning to Japan from the United States and of United States citizens returning to the United States from the Orient. Although these exchanges were extremely difficult to arrange, hope to arrange further exchanges in order to save the lives of Americans held in Asia was never abandoned by the State Department and likewise hope to return to Japan, even during the war, was never abandoned by those desiring repatriation. Many of those who accepted segregation in the summer of 1943 did not anticipate a long stay in the Tule Lake Center but hoped to be returned to Japan by diplomatic exchange.

With the exception of infants, therefore, and family members incapable of independent decision, substantially all persons who went to or remained in Tule Lake after the segregation date in the

autumn of 1943 had indicated an acceptance of a Japanese dominated future which involved going to or remaining in a camp guarded with barbed wire and sentry towers as opposed to the option of going to or remaining in one of the nine relocation centers (only a few of which were so guarded) to await reloaction at liberty in the United States. These persons also knowingly accepted the stigma of disloyalty to the United States.

The physical movement of persons among the various centers commenced in the autumn of 1943 and was substantially complete on November 1, 1943. On that date there were approximately 18,000 persons of Japanese ancestry living in the Tule Lake Center, many of whom had come from other camps, some of whom comprised the leadership of the pro-Japanese factions of each of the ten relocation centers and who, to some extent, thereupon commenced to compete with each other for leadership of the new segregation center.

Prior to November 1, 1943, a number of grievances had been urged by at least some of the residents of the Tule Lake Center relating to living conditions, food and the like. On November 1, 1943, Dillon S. Myer, the National Director of the War Relocation Authority, was at the Center on an inspection trip. On that day a crowd of at least a thousand persons of Japanese ancestry gathered around the administration building in such a way as to create the impression among some Caucasian members of the War Relocation Authority staff that

the crowd was imprisoning the administrative officials within the administrative building. Leaders of this crowd then conferred with Mr. Myer and with Mr. Ray O. Best, the Director of the Tule Lake Center, and further pressed demands. As a result of the pressure put upon the administrative officials by the crowd, Mr. Myer addressed the crowd from the porch of the building. During this time some members of the staff were physically prevented from entering or leaving the area surrounding the building and also during this period some persons of Japanese ancestry walked through corridors of the center hospital against orders and, as a result of that incident, a scuffle ensued between the chief physician of the center and persons of Japanese ancestry. The physician was knocked unconscious, dragged outside and severely beaten. Four days later a group of youths entered the area in which motor equipment was parked which they were forbidden to enter at night. They thereupon approached the house of Mr. Best in such a manner as to cause him to believe he was about to be attacked and he then requested the assistance of the Military Police who were camped immediately outside the main gate. The soldiers entered on the night of November 4 completely equipped with armored cars, gas, machine guns and the like and assumed control of the camp.

The reverberations of these two incidents were immediate. The press called great attention to what it described as rioting. A number of em-

ployees of the War Relocation Authority became afraid and declined to remain within the fenced area. A committee of the California legislature took testimony from some of these persons and others having knowledge of the incidents, which testimony was strongly critical of the War Relocation Authority and insistent that more stringent measures be taken. Within a month the same subcommittee of the House Select Committee to Investigate Un-American Activities which had held hearings in the spring held additional hearings concerning the Tule Lake incident, which hearings also were markedly critical of the situation as it then existed.

In my capacity as the Department of Justice officer designated to keep in touch with this general problem, I attended several of these hearings held in Washington, was in close touch with the officers of the War Relocation Authority and was generally familiar with developments. It was the opinion of other officers of the Department, and it was my own, that it would be necessary to modify the manner in which the problem was being dealt with. As the problem was envisaged in November, 1943, by the then Attorney General, Francis Biddle, by my immediate superior, the Director of the Alien Enemy Control Unit, Edward J. Ennis, and by me, judging from the general information available to the Department of Justice and particularly the testimony at the various hearings and the statements made to us by officers of the War Relocation Authority, especially Dillon S. Myer, it was as follows:

Whether out of necessity or out of no necessity, wisely or unwisely, constitutionally or unconstitutionally, the Army had in fact moved over 100,000 persons of Japanese ancestry, over two-thirds of whom were American citizens, out of their homes and into camps. Thereafter, the War Relocation Authority had carried out what might be termed a voluntary segregation, as a result of which those who for one reason or another wished to be in a camp of persons known to be loyal to Japan were to live at the Tule Lake Center. This camp at that time housed 18,000 persons, some of whom could be presumed to have been at all times loyal to Japan. Some others of them could be presumed to have been so seriously shocked and distressed at the entirely unprecedented act of moving and detaining a group of persons selected solely on a racial basis and at its consequent great economic and social distress and at the actual hardships of moving and being placed in unprepared, crude barracks as to have become disaffected. An unknown number, probably in excess of 2,000, of the inhabitants were what is known as Kibei, which is the term given in Japanese to young men (and very occasionally women) who have been born in the United States and who have been sent to Japan to be educated and who returned to the United States only after having spent most of their formative years in Japan. A very large proportion of these Kibei were wholly Japanese in culture and education and could speak little or no English.

Within this population of 18,000 (including women and children) there was undoubtedly some group of persons whose loyalties were to Japan and who desired to create trouble and difficulty for the United States Government. Although the exact facts are still in dispute, undoubtedly some degree of physical force was employed by Japanese loyalist elements on November 1 and 4, 1943. It was the stated opinion of Mr. Myer that there were one or two thousand men in the Tule Lake Center who were at that time loyal to Japan. It was also his opinion that many of these were to be found among the Kibei, some of whom were Japanese by race, ties of family, ties of friendship, education and language and who were United States citizens and Americans solely as a matter of place of birth. The exigencies of the war and the reasonable demands of the public that persons of Japanese ancestry avowedly loyal to Japan not be permitted at complete liberty within the United States made it obviously impossible for the United States Government or any agency thereof to embark on any program of releasing from custody this small inner group of segregants who made no secret whatever of their loyalty to Japan and of their desire to see that country defeat the United States.

The Department of Justice regarded it as a patent necessity that that small group, however identified or defined, should be detained. This, however, raised a most serious constitutional problem. It is my understanding of the feeling and belief

of the then Attorney General and of his advisers that the detention of American citizens not charged with crime even in wartime on the basis of an Administrative determination of disloyalty under circumstances not sufficiently grave to warrant the declaration of martial law was repugnant not only to the Constitution but to the basic principles of liberty upon which this Government was founded. It was recalled that never before in this country had such detention been resorted to and that the right of habeas corpus went back in British law to Magna Carta. (It was known, of course, that the British during the existing war had authorized a cabinet officer to detain British subjects on security grounds without judicial review but it was hoped that that extraordinary departure from all prior concepts of civil liberties would not be necessary in this country). The dilemma posed, therefore, was that it was imperative to detain this group of admittedly disloyal American citizens of Japanese ancestry. Martial law might have made the detention of the group lawful but it is extremely doubtful whether conditions on the West Coast in 1943 were such as to warrant a declaration of martial law. Thus there appeared to be no way by which to detain them without doing violence to basic constitutional principles.

It was the belief of the officials of the Department of Justice considering this matter that the way out of this dilemma was to be found in the attitude and conduct of the members of disloyal group

themselves. It was believed that this group was so openly pro-Japanese and so desirous of making a demonstration of that loyalty that, if given an opportunity, they would voluntarily abandon their United States citizenship, and thereby voluntarily abandon their standing as citizens to object to the detention which their conduct rendered imperative. It was further believed in the Department of Justice that Japanese law provided that a person born in the United States of Japanese citizen parents prior to December 1, 1924, automatically acquired Japanese citizenship and retained it unless he affirmatively divested himself thereof and that such a person born after that date might acquire Japanese citizenship through registration of his birth by his parents with the Japanese Consul or consular agent. It was, therefore, thought proper to presume, until the presumption was rebutted by competent evidence, that those persons of Japanese ancestry who voluntarily gave up their American citizenship and asserted their loyalty to Japan were in legal fact dual nationals. As such, when their United States citizenship ceased to exist, their Japanese nationality remained and they were, accordingly, alien enemies under the provisions of the Alien Enemy Act of 1798 (Title 50, USC Section 21 et seq.).

Thus, the proposal that American citizens should be permitted, in time of war, to renounce their citizenship as an act of their own free will, subject only to the control that the Attorney General

might disapprove the renunciation if it affirmatively appeared to him to be contrary to the interests of national defense, was made for the purpose of devising a system of controlling the disloyal and riotous elements at Tule Lake while not doing injury to the Constitution and to the traditions of the Nation.

This problem became acutely one for the Attorney General on December 8, 1943. Up to that time he had never been asked to give nor had he given an opinion as to the constitutionality of the detention of American citizens of Japanese ancestry in the various camps. On that date a request was addressed to him by the Chairman of the subcommittee of the House Select Committee to Investigate Un-American Activities to appear before that subcommittee to make recommendations concerning what should be done concerning the general problem existing at Tule Lake. The Attorney General was then confronted with the necessity of making a recommendation either for the detention of American citizens not charged with crime and not under martial law by an administrative act of a military or civil official, or of recommending a means for accomplishing the detention of this group without violating the Constitution. In this situation Attorney General Biddle accepted the recommendation made to him by his advisers named above and on December 9, 1943, he recommended the enactment of legislation to permit voluntary renunciation of citizenship. Thereafter a bill was drafted

which became the Act of July 1, 1944, which is subsection (i) to Section 401 of the Nationality Act of 1940, as amended. The Attorney General testified again in favor of this legislation before the House Committee on Immigration in January, 1944, and the legislation was introduced, and passed.

While this legislation was pending and while the Army was gradually returning the control of the Tule Lake Center to War Relocation Authority officials following the incidents of November, 1943, the leadership of the persons of Japanese ancestry in the Tule Lake Center began to change and a group arose which did not favor violent action against the administration because of food, housing, etc., but which favored correct relations with the administration coupled with spiritual and physical preparation for return to Japan. This latter group reasoned that Japanese victory or at least repatriation was near and that the true Japanese should be prepared to resume life in Japan and that the young men should be prepared to fight for the Japanese Emperor. This group felt that the presence within the center of persons who were not truly loyal to Japan but who were loyal to the United States or who had remained out of inertia or who were awaiting to see how the war would end were undesirables. The group, accordingly, demanded what was called "resegregation," by which was meant a second segregation and removal from Tule Lake of those whose loyalty to Japan was questionable. Members of the undesirable group

were called "inu" or "dogs." Petitions for re-segregation were circulated and were sent to the War Relocation Authority, to the Secretary of the Interior, the Department of Justice, the Department of State and to the Spanish Legation in Washington, which was the Legation of the protecting power for Japanese interests in this country under international law. At least 7,000 signatures were affixed to these petitions.

After these petitions had been procured, the group which had procured them, namely the group of persons most eager to return to Japan and least willing to associate with other persons of Japanese ancestry not fanatically loyal to the Emperor, formed themselves into a society for the general promotion of repatriation and of preparation for return. One of the principal concerns of this group was that American-born children other than Kibei had been exposed to American education and American life and therefore were not adequately trained to return to Japan. This group set out to provide education in ways of Japanese thinking, history and Japanese culture and the like.

The Japanese Language Schools, which existed parallel to a system of American schools in the center, to a considerable extent cooperated with this group in preparing the children for return to Japan. Inasmuch as it was the assumption of many of the members of the staff of the War Relocation Authority that the center population would go to Japan either by exchange or at the conclusion of the

war, this preparation of Americanized children for Japanese life was not universally regarded as evil. One school which was conducted at the center until January, 1945, was called the Greater East Asia School after the notorious Greater East Asia Co-Prosperity Sphere.

This organization of persons loyal to Japan underwent a number of changes of name but continued to exist substantially until the end of the war, although from December 1944 onward efforts were made to stamp it out.

At some undetermined time in the summer of 1944 this organization, which was principally but not entirely composed of aliens, sponsored another organization for young men roughly between the ages of 18 and 30 who were principally but not entirely citizens (although many of them were Kibei). This organization in some respects was independent and in some respects bore the relation to the older one of an auxiliary to a parent organization. This organization also had several Japanese names at different times, the general meaning of all of which was Young Men's Fatherland Association. From mid-summer 1944 until January 1945, when efforts were made to stamp it out by removing all of its members to Department of Justice internment camps, this organization became steadily more openly pro-Japanese and more active in flaunting these activities in the face of the American authorities. The existence of the two Japanese patriotic organizations and of their more and more open

activities was not known to the officials of the Department of Justice above-named until December 5, 1944.

The bill permitting renunciation of citizenship in time of war became law on July 1, 1944. Considerable time was spent in preparing regulations and forms to implement this statute and it was not until the autumn of 1944 that the Department of Justice was prepared to administer it. Commencing in July 1944 individual letters and group petitions began to come in to the Department of Justice containing requests for permission to renounce citizenship. After the proper forms for applying for such permission were mailed out in October 1944, several hundred typewritten copies of such forms were mailed from the Tule Lake Post Office to the Department. These were nearly identical and seemed to have been prepared by the same typist. At the same time petitions were received for permission to renounce bearing the signatures of hundreds of persons. Because of the ease with which the signatures to petitions might be coerced or forged by anyone interested, some concern was felt by officials of the Department of Justice familiar with the matter (who by this time included, in addition to those named above, Assistant Attorney General Herbert Wechsler, in charge of the War Division). As a result, it was determined that all available steps should be taken to insure that no person renounced his citizenship unless he understood what he was doing and desired to do it.

The Act itself provides for renunciation merely by appearing before an official named by the Attorney General and by signing a designated form. There is no requirement for any determination whatever other than the implicit ones that the renunciant knows what he is doing and wishes to do it, and the stated condition in the statute that the renunciation be found not contrary to the interests of national defense. At one time, the Attorney General's advisers considered setting up very simple forms which could have been executed rapidly in the presence of any competently trained Government clerk. In order to slow down the process, however, for the precise purpose of minimizing the possibility of coercion or mistake, the regulations were made far more cumbersome than necessary. Pursuant to the regulations and to the Department's interpretation of them, it was necessary for an applicant first to write to the Department in Washington requesting a form. Upon receipt of the form it was then necessary for the applicant to fill out and return it to the Department requesting permission to renounce. Thereafter the regulations called for a hearing to be held, and in practice, as will be said further, that hearing was far fuller than necessary to fulfill the statutory requirements.

In order to determine whether or not coercion existed, I was sent by Assistant Attorney General Wechsler to the Tule Lake Center, at which I arrived on December 5, 1944. On that date I and, through me, the officials of the Department of Jus-

tice first learned of the existence of the disloyal groups above referred to. At the outset of my investigation at Tule Lake I arranged to have a hearing room set aside for my sole use and I was assigned a Caucasian interpreter and a Caucasian stenographer by the War Relocation Authority. I first called in and questioned separately about 62 persons who had filled in the typewritten copies of the printed form requesting permission to renounce citizenship, above referred to, and which officials in Washington had feared might indicate coercion. I questioned each of these persons in detail as to their desire to renounce citizenship, their reasons therefor and the circumstances surrounding the filing by them of the typewritten forms.

Although each person was alone with no other person of Japanese ancestry in the room and although each person was carefully questioned, every person questioned stated without hesitation that it was his or her own wish to renounce American citizenship so as to be solely Japanese. Substantially all of these persons indicated a desire to return immediately to Japan and substantially all of those who were questioned about it stated they desired to see Japan win the war. No one stated that he had been forced to sign the form and most of them stated that they had procured the form through friends. A few of them asserted that the form had been passed out to them by volunteers but that, since they had been trying to get forms from

Washington in vain, they regarded this as a helpful service. The names of the persons who had typed the forms were obtained by me and they also were questioned. They admitted typing the forms but stated that they did this to help out friends and others desiring renunciation. They explained that many persons were distressed at the slowness of the Department of Justice in putting the renunciation program into operation and that they had typed the forms to allay the impatience of the prospective renunciants. In the course of this exhaustive investigation, all of which is available in stenographic transcripts, I was able to find no hint of coercion as I understood that term as a lawyer. I did, however, learn of the organizations and did learn that they favored renunciation. I also heard other cases of individuals who wished to renounce for reasons not directly related to loyalty, such as desire to return to Japan with a husband or parent. These considerations are discussed below.

In December 1945 I learned that the young men's patriotic association had procured a considerable number of bugles and that they were conducting exercises each morning at 6 o'clock which were a combination of gymnastics, drilling in formation and patriotic observances. (On the evening of December 8, which was the anniversary of the attack on Pearl Harbor as measured by Japanese dates, a large memorial gathering was held in the center.) The young men wore a uniform at that time consisting of blue work trousers, a white sweatshirt

and a white head band. It was estimated by officials of the center to whom I talked that about a thousand young men participated in these exercises each morning. The week-day exercises were engaged in by the young men in small groups and on Sunday at a later hour all the young people would exercise together. In addition to the exercising, they would engage in bowing toward the Imperial Palace and calisthenics which, I was informed, commemorated historic Japanese events and heroes. Much of the calisthenics, furthermore, closely resembled actual military drill.

Because of the obviously undesirable nature of this organization, I undertook to ascertain the identity of the leaders thereof with the view to permitting them to renounce their citizenship first so as to cause them to become alien enemies, at which time they might be apprehended upon alien enemy process and interned in Department of Justice internment camps for alien enemies. In a series of hearings which I conducted in the cases of the leaders I learned that the organization was entirely open in its activities and that it had an office in one of the buildings regularly assigned it, that inside this office the Rising Sun flag was displayed and that there was a sign in Japanese that anyone who spoke English on the premises would be fined ten cents. These leaders were quite open in stating to me that their purpose was to prepare the young men so that when they should be exchanged they would be prepared to fight in the Japanese Army. They stated

to me that they understood that when the segregants had arrived at Tule Lake they had made up their minds to go to Japan and, since they desired to go to Japan, it was only reasonable that they should train themselves to be Japanese.

In order to expedite the removal of the leaders, both of the parent league of pro-Japanese fanatics and of the young men's auxiliary, I prepared a list, by means of interrogation, of all of the leaders in the two groups and then called in each of them. Those who were citizens were asked whether they had applied for renunciation and substantially without exception they had. In every case they voluntarily executed the form for renunciation of citizenship.

On or about December 23, 1944 I returned to Washington and reported to Edward J. Ennis, Assistant Attorney General Wechsler and Attorney General Biddle. On my recommendation the Attorney General approved the renunciation of citizenship of the citizen leaders of the group referred to and authorized the apprehension on alien enemy process of those who had originally been aliens, as well as those who became alien enemies through renunciation. I reported to these officials the existence of the very active pro-Japanese movements in the center. It was agreed that the two organizations must be dissolved and that the measure most likely to succeed was the internment as alien enemies of the leaders. It was further agreed that if additional leaders should be chosen to replace those interned

they also should be removed to Department of Justice internment camps.

Attorney General Biddle then directed me to arrange to return to Tule Lake in charge of a Department of Justice mission to handle the processing of renunciation applications. In order that the operation might be carried on as carefully and as intelligently as possible, I was instructed not to rely on persons with merely clerical training but to take with me from Washington trained personnel. I did take from Washington three attorneys from the Alien Enemy Control Unit and one officer from that Unit who was not an attorney but who had been assigned to the Unit only during the war and who was regularly a high career officer of the Immigration and Naturalization Service. In addition, six stenographers and a clerk were dispatched to Tule Lake from various offices of the Department of Justice.

On December 19, 1944, shortly after I had left Tule Lake, Major General H. C. Pratt, Commanding General, Western Defense Command, withdrew the public proclamations and orders of 1942 which had ordered the exclusions of all persons of Japanese ancestry from the West Coast area and permitted all such persons to return to California with the exception only of named individuals who were served with individual exclusion orders. Simultaneously the War Relocation Authority issued an announcement throughout all of its centers that all the relocation centers would be closed within ap-

proximately one year or by December 31, 1945. There is a dispute as to whether it was intended by Dillon S. Myer, the Director of the War Relocation Authority, that this be understood at Tule Lake as an announcement that that center would be closed on or before the date set, but there can be no dispute as to the fact that there was an announcement by the War Relocation Authority officials at Tule Lake to the residents of that camp that it likewise would be closed within one year and that all of the War Relocation Authority staff at that center and all of the persons confined in the center understood that the camp was to be closed within a year. For reasons which will be discussed below, the announcement that the center would be closed within one year coincided with an extremely sharp upswing in the number of applications for permission to renounce citizenship filed with the Department of Justice. The announcement as to the closing of the center was made on December 22, 1944. December 25 fell on a Monday. On December 26 approximately 2,000 pieces of mail were received in the Department from Tule Lake indicating a desire to renounce citizenship.

In the first week of January, 1945, I left Washington for California by train with the following hearing officers: Charles M. Rothstein, Joseph J. Shevlin, Ollie Collins and Lillian C. Scott. I devoted a considerable part of the time spent in travel in an endeavor to give these hearing officers as full a background concerning the general problem of the

Japanese evacuation as I could. I told them in detail of the agitation arising in 1942, of the fact that there was no evidence of any espionage or sabotage committed by any person of Japanese ancestry either at the time of Pearl Harbor or thereafter. I told them of the hardships caused by the evacuation and of the circumstances surrounding the segregation. I particularly told them that it was my opinion that the loyalty questionnaire had been ineptly handled and that a negative answer to the loyalty question was not necessarily indicative of disloyalty but might be due to mistake, confusion or resentment over the evacuation. I further explicitly told them that it was my own opinion that the entire evacuation had been a tragic mistake due almost entirely to the unfortunate giving way by certain military and other officials of the Government to an unreasoned wave of public hysteria. I further told them that the segregation of 1943 could not be relied on in every case as a positive determination of Japanese loyalty but that it had been in most cases a voluntary choice which in fact might have been dictated by such loyalty or by a number of other factors such as desire to keep a family unit together, resentment at treatment given to United States citizens by their Government, a desire to avoid the draft, etc., etc.

Coming specifically to the task of administering the renunciation statute, I told the hearing officers of the strong pro-Japanese pressure in the center and instructed them to be particularly diligent in endeavoring to detect any sign of coercion. I then

told them that, even though they were satisfied that a particular applicant for renunciation might fully understand the nature of the act and at the moment desire to accomplish it, the hearing officer nevertheless was not bound to recommend approval if he felt in the particular case that the subject was not truly loyal to Japan and was imbued with American principles, ideals and culture but was acting because of some unusually difficult family situation or because of resentment at his evacuation and subsequent detention. In such cases the hearing officers were instructed neither to approve nor to disapprove but to dictate a memorandum on the record so that the entire file, the transcript of the hearing and the hearing officer's memorandum might be studied in Washington. With the exception of this instruction, the hearing officers were told that, as a legal matter, all that was necessary was for the applicant to come before the officer, satisfy the officer that he understood what he was doing and wished to do it and then sign the renunciation form. Nevertheless fuller and more careful hearings were desired. The purposes of these hearings, they were told, were three-fold:

First, to explore every possibility of coercion. If any sign to coercion were noted, the applicant was, of course, not to be permitted to sign the form.

Second, to determine whether there was any group which, although voluntarily renouncing, nevertheless was so clearly pro-American and so clearly acting solely out of bitterness that some change in the

regulations or in the statute should be considered.

Third, to obtain information concerning the entire problem of the administration of the Tule Lake Center since at that time it was though not unlikely that the center would be transferred to the Department of Justice to administer.

With respect to the general issue of coercion, I specifically explained to the hearing officers that renunciation, as any other legal act, would be coerced and hence void if it were done under imminent or immediate threat of physical injury to one's self or to a member of one's family. I gave this definition of the legal concept of coercion and went further to say that if there was any indication whatever in any case that renunciation was being made under any threat at all without regard to its imminence, the applicant for renunciation should not be permitted to sign the form and that the matter should be reported to me for further consideration. I said further, however, that the law gave every citizen of the United States in time of war a right to renounce his citizenship subject only to the proviso that, if it affirmatively appeared that such renunciation would be contrary to the interests of national defense, then the Attorney General might disapprove the renunciation. For that reason it was not legally relevant to determine the ultimate motivation which might lead a renunciant to abandon his citizenship beyond the determination that he understood what he was doing and at that moment desired to do it. I said that many motivations

other than ultimate loyalty to Japan might be at work and that, for example, persons might renounce because they believed that all aliens would be repatriated at the end of the war and because they desired to remain with their alien parents. A renunciant might renounce because he was the eldest son and, as such, was responsible for the family property in Japan. Renunciants might abandon their citizenship because their parents feared that otherwise they would be drafted or forced out of the Tule Lake Center. I said that these reasons were not grounds for determining that renunciation was coerced and that an intentional act of renunciation free from fear was as valid if done for the motive of remaining with a parent as if done out of the truest loyalty to Japan. I stated to the hearing officers that the legal act of renunciation was comparable to the legal act of marriage and that a renunciant had legal capacity to renounce even though he was not loyal to Japan, just as a man or woman might have legal capacity to marry even though not devoted to the proposed spouse. In conclusion, I repeated to the hearing officers the instructions given me by Assistant Attorney General Wechsler which were to the effect that the duty of the hearing officer was comparable to the duty of a careful and humane judge in accepting a plea of guilty and that just as a judge will accept a plea of guilty if he is satisfied that the accused understands the nature of the charge and the nature of his response thereto and is not in fear of injury either to himself or to a mem-

ber of his family, without regard to what reasoning leads the accused to make the plea, similarly the sole legal issue before a hearing officer was whether renunciation was a voluntary and comprehended act.

The Department of Justice mission arrived at Tule Lake on January 11, 1945. A special office building outside of the inner fence of the center was made available which consisted of a large waiting room, five hearing rooms and a stenographer's room. The War Relocation Authority made available to the mission two Caucasian interpreters, both of whom were women who had served as school teachers in Japan. The mission was also assigned one guard in the building and another guard to drive renunciants in an automobile from the gate to the building. The procedure which was followed was that the Department of Justice staff would, from the list of persons who had applied for permission to renounce, prepare a calendar or schedule of persons to be heard 24 hours in advance. This list would be given to the internal security officers of the War Relocation Authority. They would inform the applicants that their cases would be heard on the following day at an approximate time. Each applicant would then present himself at one of the gates and in course would be let through the gate and driven by automobile to the hearing building. He would then come into the waiting room and would be given a number by the clerk. When his turn came he would be escorted alone to one of the hearing rooms where there would be present the

hearing officer, the stenographer and, if necessary, one of the Caucasian interpreters above referred to. With the exception of a few cases where women found it necessary to bring children with them, no person of Japanese descent other than the renunciant was ever permitted in the hearing room. On a few occasions more than one hearing officer would be present during a hearing and in at most twenty cases out of the more than 5,000 hearings held an anthropologist employed by the War Relocation Authority, Dr. Marvin Opler, was present. So far as I am aware, no other employee of the War Relocation Authority was present at any hearing. Although the lengths of the hearings varied from a few minutes to more than an hour and although the line of questioning was varied, where there was no particular information desired by the hearing officer for policy or security reasons and where the case appeared usual, the practice was for the hearing officer first to obtain the necessary statistical facts, such as name, place of birth and the like, from the renunciant and for the officer then to show the renunciant his application for permission to renounce. In each case the officer inquired whether the signature was that of the applicant and then asked the applicant why he had signed it. He was then asked in each case whether he signed it of his own free will or whether he had been instructed or ordered to sign. There then followed a period of questioning designed to explore the renunciant's reason for desiring renunciation, both in an effort

to detect coercion and to make sure that the legal effect of the act was clear. When this examination was complete the renunciant would be shown the final form and asked whether he understood it. If he did, he would be shown where to sign the form and once more told that it was his own choice and that no one could require him to sign. He was also told that if he did sign he would forever cease to be an American citizen or to be entitled to any of the rights of citizens and that he would in all probability be returned to Japan at the close of the war. He was further told that if he did return to Japan he would in all probability never be allowed to return to the United States. When these matters had been made clear the hearing officer would either endorse his recommendation of approval of the renunciation as not contrary to the interests of national defense or, in a few cases, would dictate a memorandum indicating that the case should be further reviewed in Washington. Although in the cases of three Japanese accorded renunciation hearings in Hawaii and three or four cases of persons not of Japanese ancestry and having no relation to the instant cases, the Attorney General has authorized renunciation hearings to be held by other officers, no person of Japanese ancestry has ever renounced his citizenship in the continental United States before any hearing officer other than affiant, Charles N. Rothstein, Joseph J. Shevlin, Ollie Collins or Lillian C. Scott. Every renunciation hearing conducted by any of these

persons followed the general pattern stated here. Every renunciation hearing was taken down by a stenographer and, to the best of my knowledge and belief, was transcribed and the transcript is contained in the files of the Department of Justice.

In no hearing which I personally conducted was there any evidence or indication whatever of coercion or duress. In no hearing which was ever reported to me by any of the above named hearing officers or by anyone else was there any such indication. To the best of my knowledge and belief there was no claim of duress, as that term has ordinary legal significance, in any of the more than 5,500 renunciation hearings conducted at Tule Lake. In about two hearings conducted by me and in a few others of which I was told, the applicant stated that he had signed the first form at the request of a parent but that he did not in fact desire to renounce. In each such case the applicant was not given the final form to sign and the hearing was forthwith terminated.

Upon my return to Tule Lake early in January 1945, I at once observed that the tension among the persons confined in the center had greatly increased since the middle of December and that the situation generally had deteriorated. The activities of the openly disloyal persons were more flagrant and the demand for quick renunciation had increased. Prior to my arrival, an announcement had been published in the center newspaper to the effect that applications for permission to renounce and correspond-

ence with the Department concerning renunciation might be addressed to me at Tule Lake. By the time of my arrival, over 1,000 pieces of mail had been addressed to me registered mail, return receipt requested, at the center from persons confined therein, thus causing a temporary breakdown in the postal system. While some of these were merely requests for application forms or application forms themselves duly filled in, many of these thousand pieces of mail contained requests to be heard out of order and in advance of others. Substantially all of these letters were courteous in tone but insistent as to the writer's urgent desire to become a renunciant and to abandon United States citizenship. In addition to these registered letters, very many other pieces of mail were addressed to me at the Tule Lake Center at this time.

I learned that the disloyal young men's organization had increased its activities and had promulgated a rule that its members should have their heads. Although all of its officers had been removed to an internment camp in New Mexico on December 27, 1944, by early January the entire hierarchy of officers had again been filled, which involved fifty individuals. The hierarchy of officers of the older disloyal organization had also been replaced. In addition to requiring shaven heads, the young men's organization had now embroidered a Rising Sun on the breast of the white sweatshirt which constituted a part of the uniform. In conjunction with the Rising Sun, there were stenciled some Japanese

characters in black ink which represented a patriotic slogan. The patriotic exercises were being conducted more regularly and, on the first Sunday after I returned to Tule Lake, the young men's organization, having learned in which part of the administration's quarters I was living, arranged to hold its Sunday ceremonies, complete with a corps of buglers, at that point of the fence nearest my room.

At this time I also learned that the older disloyal organization had for sometime been putting out a paper in Japanese having as its title a word which can be translated approximately as "fatherland". This paper, which was mimeographed at regular intervals, contained much material glorifying the Japanese Army in its war aims and asserting loyalty to the Emperor. One article referred to the war between the United States and Japan as a holy war.

At the time of my second return to Tule Lake, the young men's organization prepared and furnished me a list which purported to be its membership list. During the succeeding weeks substantially everyone whose name appeared on the list was questioned and substantially each person on the list admitted his membership and his adherence to the principles of the organization. Substantially every person on the list appeared before the hearing officers dressed in the sweatshirt already described having the Rising Sun embroidered on the breast. Each such person had his head shaven and

the hearing officers were informed, whenever the question was asked, that the shaven head was the symbol of the Japanese soldier. In a few cases it was established that there was a mistake in names and in a number of other cases it was stated that the member had resigned. In no case, however, of which I have knowledge did the renunciant assert that his name had been placed on this list because he had been coerced or forced in any manner to join the organization. On a number of occasions persons stated or wrote in indicating that they had resigned from the organization and the files of the Department of Justice contain at least five letters from the officers of the association informing the Department of Justice mission of deletions from the membership rolls due to resignations. In no case of resignation was it suggested in any manner that any harm was inflicted on the resigner.

Since it was deemed important to minimize the influence of the disloyal organizations and to terminate military drilling in a species of uniform preparatory to service in the Japanese Army, it was at once determined that the entire second list of officers of both organizations should be removed and interned as soon as practicable. Accordingly, the hearing officers set about giving hearings to this second group and, pursuant to an approval of renunciation by the Attorney General and authorization of apprehension, the second group of officers was removed to Department of Justice internment camps on January 26, 1945. Thereafter, and with

substantially no delay, a complete third slate of officers was elected and the Department of Justice was informed at this time that the organizations contemplated continuing to elect officers so long as the Department of Justice continued removing them. Since the organizations had by now survived the removal of two complete sets of leaders, it became evident that they had broad support and were not the work of a few fanatics. It was, therefore, determined, after telephonic consultations conducted by me with my superiors in Washington, that the entire membership of the militant young men's organization should be removed and the hearing officers were, accordingly, directed to hear first the cases of persons on this list. About 650 members of the organizations were removed on February 11, 1945 after processing as described above, and about 125 more were moved on March 4, 1945. By this time all the leaders and all of the members who were active members on the list furnished in January 1945 had been removed. In addition, several sets of the leaders of the older disloyal organization had been removed, as well as the writers for the "fatherland" magazine above described, the *teach* of the Greater East Asia School, teachers at a number of other Japanese Language Schools who had been found to be active in pro-Japanese propaganda, and a number of Buddhist priests who had been active in propaganda. It was hoped that at this time when the leadership of the pro-Japanese group had been removed that there would be a sub-

stantial withdrawal of applications for renunciation. This movement did not take place, however, and substantially everyone who applied for renunciation went through the process which continued for sometime after the last of the leadership group had been removed. It would be incorrect, however, to state that all of the members of the young men's group were removed since, as renunciation was only permitted for boys and men of the age of 18 or over, younger boys who remained took up when their older brothers were removed and blew the bugles and drilled for Japan. Similarly, since no women were removed, a women's organization was started which joined the boys in Sunday morning drilling.

The statute authorizes the Attorney General to disapprove renunciation only if it appears contrary to the interests of national defense. The Army had determined that it would not accept any men from the Tule Lake Center and the Selective Service System at the time of the hearings was making no effort to induct any males of Japanese descent from the center. It thus appeared that there was no problem of national defense in any of these cases and, indeed, in no case did it appear that the interests of national defense required disapproval and, therefore, there was no case in which the Attorney General could properly have disapproved renunciation on any ground providing that it was uncoerced and understood. The residents of the center, however, failed to understand this and be-

lieved that there was some discretion or option lodged in the hearing officers. For this reason they appeared most anxious to persuade the hearing officers of the necessity of permitting their renunciation and, to do this, they made extreme claims of loyalty to Japan. Because of this it frequently became impossible to conduct a frank and free examination of the renunciant's state of mind and became useless to ask many questions which would otherwise have been of interest. For example, it was observed that if the renunciant were asked his opinion of the Emperor he would usually, if not always, leap to his feet and stand at rigid attention and then assert that he regarded the Emperor as the Living God. Similarly, substantially every renunciant who was asked stated that he believed that Japan would win the war and that he hoped for this result. Despite this tendency of the answers to become stereotyped in an effort to persuade the hearing officer of the active disloyalty of the applicant, the hearing officers in every case were able to ask enough questions to make sure that the applicant understood the nature of renunciation and that it was the applicant's desire not only to sign the application form but to persuade the officer that the applicant was actively disloyal to the United States and that his application should, accordingly, be approved.

On the occasion of my second trip I remained in Tule Lake for nearly three weeks. During this time I arranged the procedures and conducted some hear-

ings myself. A great deal of my time, however, was spent in discussing with various officials of the War Relocation Authority and of the Army detachment there the reason for the very great rush of persons to renounce. Estimates as to the number of persons who would renounce had been made prior to the enactment of the statute by various officials ranging between 500 and 2,000. Even during my first trip to Tule Lake in December 1944, it was not expected by anyone that, of the 7,000 citizens over 18, over 5,000 would renounce. Yet this number of applications for renunciation flooded in at the time of my second trip. This caused concern both in Tule Lake and in Washington and I devoted considerable effort to endeavoring to understand the reasons for this development since it was hoped that in some way this flood might be stopped and some of those persons who were not in fact disloyal but merely disgruntled might be dissuaded from throwing away their citizenship. Accordingly, I talked at great length with Mr. Ray Best, the Director of the center, Mr. Louis M. Noyes, the War Relocation Attorney at the center, the Chief of the Internal Security Guard, to many of the guards themselves, to the Colonel commanding the troops stationed immediately at the camp gate, to his security officers and to many other experienced persons at the center. I also talked to the head of the War Relocation Authority's regional office in San Francisco and, upon my return to Washington, I talked to Mr. Myer, the Director of the War Relocation Author-

ity, and his subordinates. At Tule Lake I particularly talked also to Dr. Marvin Opler, an anthropologist who was employed by the War Relocation Authority as what was called a "community analyst," whose job was solely to gather social information concerning the community and to report on community trends. On this job he had a staff of persons of Japanese ancestry living in the community and reporting to him on developments. I also talked to ministers and social workers and doctors and to Miss Rosalie Hankey, an anthropologist employed by the Evacuation and Resettlement Study under the auspices of the University of California and who, not being a Government representative, was able to talk to the residents of the center and to meet less reserve and resentment. Both in Tule Lake and in Washington, in addition, I read many of the reports filed on Tule Lake from sometime prior to the commencement of the renunciation hearings up to and including that period.

Although the opinions of the various officials and others differed widely as to the social considerations leading to renunciation and as to the proper policies to pursue, no official at this time ever stated or suggested to me in any way that coercion, as that term has been understood in the law for centuries, was a factor of any significance. It was the universal opinion that the population of the Tule Lake Center, consisting as it did of 18,000 persons taken from their normal homes and occupations, and placed in a wired-in area of about six square miles of black

volcanic ash, and living in uncomfortable black tarpaper barracks, under a pall of black smoke in winter and ash and dust in summer, with wholly inadequate occupation to keep them busy, and with substantially no effective control by the Government as to what activities were carried on inside the fence, had become highly emotional and excited. It was universally agreed that the rush toward renunciation was illogical and unreasoned and that many of the young men who were now marching up and down between the barracks with the Japanese emblem stenciled on their sweatshirts had been, before the war, loyal American citizens and that the asserted loyalty to Japan was often a kind of hysteria. It was a commonplace witticism among the officials of the center at the time of these hearings that the population of the center was largely mad and that the center might properly be taken from the management of the War Relocation Authority and transferred to the Public Health Service to be run as a species of mental institution. All of the discussion and speculation as to the reason for the unforeseen volume of renunciation related to the reason for this hysterical public behavior and none of it related to coercion and it was never suggested contemporaneously in any way that it might be due to coercion.

It is true that there were extensive rumors of the use of force within the center. During the summer of 1944 one person of Japanese ancestry who had been prominent in assisting the administration

as murdered and this murder was not solved. While it was believed by some that the motive for the murder was disapproval of decedent's prominent pro-administration activities, Mr. Best informed me that the most probable explanation was that the man was murdered because of improper relations with another man's wife. In addition to this, there were a number of stories of beatings and of threats thereof. These, however, related to struggles for political leadership and did not relate to private behavior. Thus, there is no doubt but that, had strong leadership arisen contrary to the leadership of the young men's organization and opposed to renunciation, the struggle as to who should lead the young men might have led to the use of physical force. At no time while I was at Tule Lake, however, was it suggested to me by any one that physical force or its threat was being employed against persons who did not aspire to leadership but who merely themselves did not desire to renounce. In this connection it may be recalled that about 1,500 persons eligible to renounce did not do so and that many persons openly resigned from the disloyal organizations and yet no record of physical violence in connection therewith came to the attention of the authorities. What is said here concerning my observations and conversations with persons familiar with the Tule Lake scene relates with equal force to the reports filed with the War Relocation Authority by officials at Tule Lake and reviewed by me for the Department of Justice. Not any of the

volcanic ash, and living in uncomfortable black tarpaper barracks, under a pall of black smoke in winter and ash and dust in summer, with wholly inadequate occupation to keep them busy, and with substantially no effective control by the Government as to what activities were carried on inside the fence, had become highly emotional and excited. It was universally agreed that the rush toward renunciation was illogical and unreasoned and that many of the young men who were now marching up and down between the barracks with the Japanese emblem stenciled on their sweatshirts had been, before the war, loyal American citizens and that the asserted loyalty to Japan was often a kind of hysteria. It was a commonplace witticism among the officials of the center at the time of these hearings that the population of the center was largely mad and that the center might properly be taken from the management of the War Relocation Authority and transferred to the Public Health Service to be run as a species of mental institution. All of the discussion and speculation as to the reason for the unforeseen volume of renunciation related to the reason for this hysterical public behavior and none of it related to coercion and it was never suggested contemporaneously in any way that it might be due to coercion.

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contemporary reports which I have seen assert that coercion was a significant factor in renunciation.

At the end of January 1945 I left Charles M. Rothstein in charge of the Department of Justice mission at Tule Lake and returned to Washington and again reported in full to my superiors describing especially the mass hysteria prevailing among the residents and the fanatical expressions of loyalty to Japan which followed it, as well as the great number of persons seeking to renounce. At this time some discussion was had as to possible measures to prevent renunciation at that time, such as the suspension of hearings, but it was the ultimate determination of the responsible officers of the Department that Congress had provided that persons who in time of war desire to renounce their citizenship may do so provided only that the Attorney General might disapprove if he found that the renunciation was contrary to the interests of national defense. It was decided that since no such consideration existed in the present cases the Department of Justice was without authority to proceed otherwise than to carry out the law and to permit renunciation by all persons who understood what they were doing and wished to do it. Although it was felt that there as a state of great excitement among the residents, nevertheless it was thought that that excitement was not of a character (such as insanity) which could be given legal effect. With respect to those cases previously discussed in which the hearing officer felt that the renunciant

was in fact Americanized and was acting solely out of resentment at evacuation or some similar motive and in which the hearing officer desired that a further review as to policy be conducted in Washington, a disagreement arose among the responsible officials and no decision was made at that time as to the disposition of the cases, and they were merely set aside. These cases were not acted on before Attorney General Biddle and Assistant Attorney General Wechsler left the Department and, in fact, had not been acted upon as of the date of my leaving the Department, June 3, 1946.

Following my departure from Tule Lake, Charles M. Rothstein continued to receive renunciations until the list was completed on March 17, 1945. A number of renunciation applications came in thereafter from Tule Lake and Mr. Rothstein again went there in July 1945 and held additional hearings. Although additional persons deemed undesirable by the War Relocation Authority were interned at the request of that agency by the Department of Justice during June and July 1945, the Department of Justice had completed its removal of disloyal persons it considered troublemakers by March 4, 1945. Thereafter, there was substantially no move to withdraw or cancel renunciation until June 1945, in which month a number of applications came in. None of the first applications asserted that the renunciation had been made under coercion but appeared to assume that, since renunciation was a voluntary matter, its cancellation would likewise be.

Form letters were written to such persons explaining that it was not within the power of the Attorney General to restore citizenship once lost through renunciation and that the renunciation itself was valid because it had been made in the absence of coercion and with a clear understanding of what was being done. Thereafter, the tenor of the letters seeking cancellation of renunciation changed and careful statements concerning coercion were made in many of them. In this connection it was noted that persons who at the time of their hearings could speak little or no English and who, according to the files of the Department of Justice, had substantially no American education, at this time appeared as the purported authors of letters containing arguments previously advanced by members of the War Relocation Authority staff or by members of the families of that staff couched in English to be expected of educated persons.

Although 3,557 persons are plaintiffs in the instant suits or have otherwise now indicated a desire to withdraw their renunciation of citizenship, as of the sixth day of August, on which the atom bomb was dropped on Hiroshima, very few had written to the Department of Justice indicating a desire for withdrawal, and even the Japanese surrender did not start the great rush away from renunciation. Thereafter, however, counsel for the plaintiffs arrived at Tule Lake in person and was retained by some of the plaintiffs herein. This set off a chain of reactions said by competent observers to be closely

parallel to the rush toward renunciation in December 1944 and January 1945. Groups were set up to encourage persons to join in the suits and much the same social rush to be listed as a plaintiff in the instant group of suits arose as previously had arisen to be listed as a renunciant.

As has been said, none of the contemporary statements made by responsible War Relocation Authority officials at Tule Lake indicated a belief that coercion was a significant factor in renunciation and none of the contemporary reports which I have seen indicates this. It came to be the opinion of some of the persons in the War Relocation Authority, however, in the spring and summer of 1946 that coercion was a factor although it is not clear that these persons also understood what the word "coercion" means in contemplation of law. The development of this opinion held by officials not responsible for the conduct of the hearings and who, with one exception, did not attend any hearings may be viewed in the light of the fact that at the time of the hearings and thereafter until the cessation of hostilities it was believed by all responsible officials of the Department of Justice that all renunciants would have to be detained for the duration of the war and that they would thereafter be repatriated to Japan. This belief was communicated to Dillon S. Myer early in the program and he and his subordinates strongly disapproved of it, feeling that it would be possible and desirable to relocate renunciants in the United States at an

early date. This and other differences of view between the War Relocation Authority and the Department of Justice gave rise to a disapproval by the War Relocation Authority of the renunciation program generally and, when it became apparent that the only way in which renunciation could be set aside was by proof of coercion, it came to be thought by some members of the War Relocation Authority's staff that the renunciations had been coerced. At the time that this view was formulated, a parallel view was expressed in parallel phraseology by persons of Japanese ancestry desiring to set aside renunciation.

A letter to a private citizen signed by Mr. Abe Fortas, then Under Secretary of the Interior, has been annexed to a pleading in this case and has been stricken as improperly pleaded. This letter, of which Mr. Fortas has assured affiant he has no present recollection or knowledge, contains a statement that the very high percentage of renunciations among those eligible to renounce was brought about by the disloyal organizations, hereinbefore described. This statement contains a major ambiguity. It might mean either that the organizations forced or coerced the renunciations or that they crystallized a spirit of loyalty to Japan and disloyalty to this country which led to renunciation. If the letter is given the first meaning, then it is at variance with all of the contemporaneous statements made by the War Relocation Authority's own staff on the scene and all of the contemporaneous reports of that staff

insofar as affiant is familiar with them. It is also at variance with the experience of the hearing officers who in fact conducted the hearings and which is recorded in more than 5,000 stenographic transcripts of hearings. If, however, the statement is given the second meaning, then the letter is not very far from correct since the organizations unquestionably had an important place in whipping up sentiment in favor of Japan and in favor of renunciation. The crystallization of sentiment in favor of an ideal, however, is a far cry from legal coercion to do a specified act. By way of illustration, it may be said that the churches of the various denominations throughout the nation are unquestionably a major source of devotion to religion, yet no one would suppose that ministers and priests coerced the members of the congregations into church attendance. Based on many extensive observations of conditions at Tule Lake, it is my belief that the organizations played an important role in providing leadership for Japanese patriotic sentiment. It is my belief that this is substantially the only relevant function performed by the organizations. Their members may have used force to maintain control of their own organizations. They did not use force to augment their membership. In concluding this section of the affidavit, it may be pointed out that Mr. Fortas has not only never conducted or attended a renunciation hearing but, insofar as the affiant is aware, has never been within the gates of the Tule Lake Center.

It is asserted in the amended complaint that the Commanding General, Western Defense Command, affirmatively found as a fact that each renunciant at Tule Lake was loyal to the United States and presented no threat to the peace and security of the United States. The basis of this argument presumably is that on December 19, 1944 he lifted the general ban on all persons of Japanese ancestry within the Pacific Coast area and excluded only specific persons by individual orders, that he did not serve individual exclusion orders upon renunciants and that, therefore, he found them safe to permit back upon the Coast. It is within my personal knowledge that this argument is fallacious and that no such finding was made by the Commanding General. At the time that the Commanding General determined to reopen the Pacific Coast area to all except individually-named persons of Japanese ancestry, he determined to prepare a list of individuals as to whom there was information sufficient to form a basis for the judgment that that individual should not be permitted to return. This was to be done by means of transferring all of the security information which had been secured from various Government agencies and filed in the headquarters of the Western Defense Command at the Presidio in San Francisco into punched Hollerith cards and to determine in advance what security information was sufficient to warrant the preliminary classification of individuals as excludable. The list was then to be prepared mechanically. Persons

on such a list were then to be given hearings by Boards of Officers and recommendations were then to be made to the Commanding General and the decision was to be made by the General personally. At this time a request was received by me for the Department of Justice from officers of the Commanding General's staff for lists of all persons who had applied for permission to renounce their citizenship. It was contemplated that this information would be placed on the cards and that each individual who had made such a request would automatically be placed on the exclusion list. I did not furnish the information at that time but subsequently after discussion with Attorney General Biddle and Assistant Attorney General Wechsler, I called upon Brigadier General Wilbur, Chief of Staff, Western Defense Command, and assured him that the Department of Justice would cause the internment of every person of Japanese ancestry who renounced his citizenship for the duration of hostilities and that, accordingly, no military problem existed since no renunciant would be at liberty within the United States. For this reason, the General agreed to withdraw the request for names. This inter-departmental agreement was on several occasions renewed by my superiors and it was at all times explicitly understood, both in the Western Defense Command and in the Department of Justice, that the sole reason why exclusion orders were not issued to the renunciants was that an exclusion order was not necessary since they would

be excluded by the Department of Justice by the fact of internment.

Not only did the General not consider applicants for renunciation eligible for return to the Coast during wartime but also he contemplated preparing a list of all such applicants and some citizens in addition and recommending to the Attorney General that persons whose names appeared thereon be detained during hostilities. It was only as a result of the agreement to detain all renunciants that the General was persuaded to refrain from recommending the detention of a larger list of persons including many citizens.

As has been stated, affiant is of the opinion that there were many motives which led to renunciation. The most obvious one was a genuine disaffection with the United States and loyalty to Japan. As has been said, there were 2,000 or more Kibei who had been brought up entirely in Japan and who had no experience with American life whatever. Particularly in view of the sentiment of the population of the coastal states regarding persons of Japanese ancestry which prevailed during hostilities, it is not surprising that many Kibei felt that they had no chance for life in the United States and that they might as well return to the country to which they were accustomed. Feeling that, it is not surprising that sentiments of loyalty to the country to which they were bound, both by ancestral ties and by cultural and educational ties, sprang up. In addition, it may be remembered that over

100,000 persons were evacuated and that generally those who were most loyal to Japan were distilled out into one group. The loyalty questionnaire of 1943, the segregation hearings and segregation itself had had some tendency to separate out from the general group those who were disloyal. This separating process had continued at Tule Lake and it would not be surprising if out of the 100,000 persons of Japanese ancestry evacuated, some 2,000 or more, including Kibei, genuinely felt loyal to Japan. Granted the existence of a nucleus of Japanese loyalty, it is furthermore not surprising that agitators and leaders acting in what was for all practical purposes a concentration camp managed to instill and fan sentiments of Japanese loyalty in young men who had been brought up in American schools to believe that all men, including themselves, were created equal, only to learn that this principle of the Declaration of Independence did not apply to them.

Although feelings of loyalty to Japan undoubtedly were important, it is affiant's opinion that by far the most significant cause of renunciation viewed from the point of view of numbers was the announcement to which reference has already been made that the center was to be closed within one year. It should be recalled that the War Relocation Authority gave printed statements to all persons arriving at its centers in 1942 that the centers were to be available as shelters to their residents throughout hostilities. In 1943 the War Relocation Author-

ity went further in relation to Tule Lake and informed segregants that they could find a home there until they could be returned to Japan. The attitude of many of the Tule Lake residents prior to the closing announcement was that they had been asked by the Government to decide whether they wished to be relocated in the United States or to be sent back to Japan when practicable and that they had decided in favor of a future in Japan. Their attitude further was that, having made that decision and having accepted the stigma of disloyalty, they had rendered themselves incapable of returning, particularly during wartime, to life in the United States outside of a War Relocation Authority center. Although prior to the lifting of the general ban the residents of Tule Lake were in fact detained there by barbed wire and sentries and although the lifting of the ban meant that all those not specifically named for detention were free to go out, there was no demonstration of a sense of joy at this sudden freedom but, on the contrary, there were wide-spread expressions of dismay and anger and very few did leave for some months. When this announcement was followed immediately by a further announcement that the center was to close within a year the utmost dismay was created since it appeared that these persons would be forced out into the general community of the West Coast during hostilities branded as disloyal and with no place whatever to go. It should be noted that at the time of the announcement the war with Japan

was still in process, and there was no clear indication that it would be over within a year. It is the opinion of affiant that it was this announcement made on or about December 20 which led to the great rush to apply for renunciation which reached the mail rooms of the Department of Justice on December 26th.

It is relevant to point out that the notice that the War Relocation Authority centers were to close in a year caused concern not only at Tule Lake but elsewhere. Distress over the center closing program was created in the other centers and in February 1945 delegates from all the centers met in Salt Lake City, Utah and adopted resolutions calling for the rescission of the closing order. Strong pressure from residents of the centers to induce the Government to keep the other centers open continued until the surrender of Japan.

Upon my second arrival at Tule Lake in January, I at once observed that the threatened closing of the Tule Lake Center was having the effect described and I, therefore, conferred with Mr. Best, the Director of the center, who agreed and both of us reported to our superiors recommending a withdrawal of the announcement. The War Relocation Authority, however, did not do this but instead announced that the center would not be closed within one year, that residents could remain at the Tule Lake Center or some similar center until January 1, 1946 and that plans for a segregation center beyond that date had not been completely worked out. At

this time a rumor became widespread in the center that the Department of Justice would operate the segregation center, if any, which was to be kept open after January 1, 1946. Since the Department of Justice was thought to have authority only to operate internment camps, it followed that, in order to remain in a camp, it would be necessary for one to become subject to internment as an alien enemy. It is affiant's opinion that about half of all renunciations are attributable to this factor alone.

A related factor is that of the draft. Whatever the loyalty of the citizen children may have been, it cannot be doubted that many of the alien parents who in 1943 determined to take their children back to Japan at this time felt loyal to that country. Understandably, they were most concerned over the possibility that their sons might be drafted into the American Army, particularly in view of the very heavy casualties encountered by the widely publicized Japanese-American combat organizations in Italy. The announcement that the center might be closed and the lifting of the general ban on persons of Japanese ancestry gave rise to a rumor that men of draft age were once more to become subject to induction. It is affiant's belief that a very considerable number of renunciations came about either because the renunciant himself feared he would be drafted if he did not renounce or because his parents persuaded him to renounce because they feared that result.

Another factor of great importance is family

loyalty. As has been said, a rumor was in circulation that all aliens at that center were to be repatriated. There was substance to this rumor to the extent that most of the aliens had gone to or remained at the center as a result of requests for repatriation. It was believed by many officials of the Department of Justice and of the War Relocation Authority that repatriation of this group of aliens would be ordered after the war. In addition, an announcement by the Japanese Government looking to additional exchanges during the war was published in the middle of January 1945 in the newspapers which freely circulated in the center. Aliens who expected to be repatriated, therefore, were concerned over the possibility that their American citizen children might either be drafted or forced to relocate in the United States and that they might forever be separated. The idea was circulated that, since aliens were to be repatriated, they would be interned by the Department of Justice and permitted to stay in some camp, whereas citizen children would not be interned, which again would work a separation. On the other hand, renunciation would put all members of the family in the same group and thereby avoid this danger. In this connection it may be said that many authorities believe that family ties and filial obedience are unusually strong in Japanese culture. Those citizen children who had become sufficiently Americanized not to feel this tie had either caused their parents not to accept Tule Lake in the first place or had

left their parents and had relocated. By and large, it was those children who were more dependent on their parents who had gone to Tule Lake and it is not surprising that to some extent it was they who accepted parental instructions to renounce in order to preserve the family unit. Pressure for renunciation was particularly strong in the case of eldest sons who, in Japanese culture, are responsible for caring for the parents and maintaining the family. If parents believed that they would be repatriated, this would constitute an additional reason for the son's renouncing his citizenship.

It is also affiant's opinion that in the case of any citizens who expected to go to Japan to live permanently renunciation was thought desirable in order to have a record of pro-Japanese loyalty and activity with which to establish oneself in Japan.

A further factor which increased the fear of forcible expulsion from the camp and also increased determination to go to Japan was the exaggeration of reports of atrocities committed against persons of Japanese ancestry returning to their pre-war West Coast homes. In addition to those incidents which did in fact occur, there were numerous rumors, circulating in the camp, of families burned alive in their houses, and the like.

Another factor was a sense of pride in consistency and in determination to adhere to a decision earlier made. Although it is generally agreed that the loyalty questionnaire of February 1943 was submitted to and filled out by the occupants of the

centers in conditions of great confusion, nevertheless affiant believes that some who answered in the negative felt that having publicly adopted that position they would lose prestige by failing to adhere later to a pro-Japanese position.

Lastly, it is affiant's opinion that an entirely irrational mass hysteria activated the people to a very great extent. There were in the center 18,000 persons with wholly inadequate work or occupation, living under not cruel but certainly unpleasant circumstances. The center had no dividing fences or walls and the people were free to do substantially whatever they liked within the outer fence, which had a perimeter of over five miles. While there were Caucasian staff members in the center during working hours, there were substantially no staff members inside the fence during the evening and at night and during Sunday except a few guards patrolling in automobiles. Although there was some entertainment, there was not much. These people had been in detention for $2\frac{1}{2}$ years and inside the Tule Lake fence for more than a year. Although they had access to newspapers and magazines, to a very great extent these were disbelieved as American propaganda. Rumors of the most foolish or fantastic nature circulated widely and were given wide credence. For example, during these hearings it was generally believed that General MacArthur was being permitted to advance into the Philippines so as to entrap his Army and most of the fleet. When this General broadcast from Tokyo follow-

ing the surrender, the fact that he was in Tokyo was cited as evidence not that Japan had surrendered but that the General had been taken prisoner. When in October 1945 the Military Police were withdrawn from the center and the duty of guarding it was transferred to the Boarder Patrol of the U. S. Immigration and Naturalization Service, it was rumored that at noon on that day the American flag was to be run down on the flagpole and the Japanese Army, which was marching southward from the Columbia River, would march in and hoist the Rising Sun. Given all these social conditions and a group of 18,000 substantially idle persons, most of whom had suffered racial discrimination for years and who had just been the victims of what must have appeared to them as the most outrageous incident of racial discrimination in American history, it was foreseeable that a state of very great emotional excitability would be created. Given further a nucleus of genuinely pro-Japanese leaders, it seems, at least in the light of hindsight, also foreseeable that this group could be whipped up into a sort of hysterical frenzy of Japanese patriotism. In fact, it was to be expected that boys from 18 to 20 having little or nothing to do would adhere with great fervor to some cause and, since the cause perforce was Japanese, it was expectable that they would shave their heads to emulate Japanese soldiers and wear a uniform with the Rising Sun on it and engage in drilling and Japanese ceremonial exercises. Indeed, these Japanese pa-

triotic activities carried on by these persons behind barbed wire fences may be likened to a very high degree to the hysterical "yammering" which sometimes occurs in ill-run prisons.

In view of the fact that, of the more than 5,000 persons who received the careful hearings above described, not one asserted that he was being coerced into renunciation, in view of the fact that no incident relating to coercion came to the attention of the Department of Justice mission which was explicitly instructed to be on the alert to observe any such incident, and in view of the fact that no Government official in any department asserted that coercion was a significant factor until months after the fact and, finally, in view of the fact that no important volume of withdrawal of renunciations took place until the outcome of the war was a moral certainty, affiant is of the opinion that substantially none of the renunciations was brought about due to coercion in the sense that the renunciant did not wish to renounce his citizenship but nevertheless signed the form because he was afraid that if he did not physical injury would be inflicted upon him or upon his family. Affiant is further of the opinion that substantially no renunciation took place because of any kind of threat or intimidation other than parental instruction.

It is patent, however, that all renunciants at Tule Lake were confined in a concentration camp at the time they renounced. Realistically, either they or their parents had chosen to go there, but neverthe-

less, at the time of that choice, they had been in another concentration camp. The only choice was whether to remain in a relocation center with the hope of relocation in a part of the country other than that where their home was or to proceed to the Tule Lake Center for segregation during the war. It is also true that no court has ever passed upon the constitutionality of detention at Tule Lake. It is also patent that there was existing at Tule Lake at the time described a very high degree of excitement whipped up by organizations admittedly extremely pro-Japanese. It is also true, as has been stated, that most of the renunciations took place at the time when the renunciants and their families were in extreme fear of being forced out of the center into a hostile community and when they believed that the only way of making sure of protective detention during the war was to make themselves eligible for Department of Justice internment. If these factors and this hysteria render the act of renunciation by persons detained under these circumstances void, then the renunciations are void. If the court is now to hold that the totality of the circumstances described in this affidavit constitutes coercion, then these renunciations were coerced. If, however, the court rules that if a man or woman, of whatever race and however badly treated by the community, refuses to assert his loyalty in 1943 and, in practical effect, voluntarily accepts segregation and thereafter applies in writing for permission to renounce his citizenship and still thereafter

files a second form asking for permission to renounce and still thereafter appears before a hearing officer and asserts loyalty to Japan and disloyalty to the United States in time of war and, in the absence of any fear of immediate injury to himself or to his family, has performed a formal act of renunciation within the scope of the statute which was passed by Congress for the precise purpose of permitting the very renunciations here in question is to be held accountable for his actions, then these instant renunciations are not void and were not coerced. It may be said that the hardships inflicted upon these persons were very great and that the hysteria and mental confusion was likewise great. It must also be considered, however, that the obligation and significance of citizenship is great and when, in time of war, one voluntarily, with full understanding, casts that citizenship aside and asserts loyalty to the enemy, that constitutes a legal act which should not lightly be set aside. In affiant's opinion, it is a legal act which cannot be set aside by recourse to any existing legal concept. Such renunciation could not be set aside as a result of a determination that legal coercion existed but only as an expression of the regret of the American people over the original act of evacuation and detention. If the renunciations are ultimately set aside, in affiant's opinion, that ultimate decision will only be justified as a determination that the persons of Japanese ancestry resident on the Pacific Coast were so goaded that some of them took the foolish

step of renunciation and that, because the moral blame is ultimately elsewhere, these persons shall not suffer the legal consequences of their own acts. Whether this step should or will be taken is not within the purview of this affidavit. It is, however, affiant's belief that this analysis should be clearly understood.

/s/ JOHN L. BURLING.

Subscribed and sworn to before me this 8th day of November, 1946.

[Seal] /s/ JANE K. CASKEY,
Notary Public.

[Title of District Court and Cause.]

AFFIDAVIT OF
CHARLES M. ROTHSTEIN

Charles M. Rothstein, having been duly sworn, deposes and says:

First, that he is now acting as assistant to the Director of Alien Enemy Control in the Department of Justice in charge of the administration of the renunciation program and has charge of and is personally acquainted with the records relating thereto; and that he was duly appointed a hearing officer by the Attorney General and was authorized to conduct examinations, take testimony and make recommendations to the Attorney General as to the basis for his finding, pursuant to Section 401(i) of the Nationality Act of 1940, as amended, as to

whether the approval of renunciation would not be contrary to the interests of national defense.

Second, that in his capacity as hearing officer, affiant arrived at the Tule Lake Segregation Center, operated by the War Relocation Authority, at Newell, California, on January 11, 1945, and that he did from this date and until the 17th day of March, 1945, conduct such hearings both under the supervision of John L. Burling and in a supervisory capacity after the departure of said John L. Burling from the Tule Lake Center.

Third, that he again proceeded to the Tule Lake Segregation Center during the month of July, 1945, and did again conduct hearings of petitioners for renunciation who had filed applications subsequent to his previous visit to said Center.

Fourth, that he has read the affidavit of John L. Burling, submitted in connection with the matter at issue, and that he concurs in such statements contained therein concerning which he has personal knowledge, namely,

1. those statements appearing in said affidavit which relate to the instructions given the hearing officers, including the affiant, by John L. Burling and,

2. those statements appearing in said affidavit which relate to the mechanical procedures evolved for the insurance of fair and private hearings and,

3. those statements setting forth statistical and other matters appearing in the records of the Department of Justice.

Fifth, that after the departure from the Tule Lake Center of said John L. Burling, no changes were made in either the instructions which he had given the hearing officers nor in the method of conducting the hearings.

Sixth, that the affiant knows of no instance wherein a recommendation for approval of renunciation was made to the Attorney General unless the hearing officer was thoroughly convinced that the petitioner genuinely desired to renounce, that he understood the nature and the consequences of his act and that his petition was the result of a voluntary action on his part and not one of duress or coercion.

Seventh, that although occupied with granting hearings, the affiant, nevertheless, acted as observer during hearings accorded by the other hearing officers and discussed problems and procedures with them to the extent that he is firmly convinced that every hearing was fairly conducted and that each hearing officer did his utmost to detect cases in which coercion or duress might be present.

Eighth, that while large numbers of the petitioners did appear for their hearings with their heads shaven and wearing the regalia of the nationalistic Japanese organizations which existed in the Center, and gave what appeared to be stereotyped answers to the questions asked by the hearing officers, all insisted that they had arrived at the decision to renounce individually and after due consideration.

Ninth, that although some petitioners gave what appeared to be frivolous reasons for their desire to renounce, large numbers of the petitioners asserted their loyalty to Japan and the Japanese Emperor.

Tenth, that although all the known leaders of the nationalistic J a p a n e s e organizations mentioned above, as well as a vast majority of the members of these organizations, had been previously removed to Department of Justice internment camps and others were openly withdrawing from membership in them, some two hundred persons at the Tule Lake Center did renounce their United States nationality during July, 1945.

Eleventh, that a stenographic record was made of each and every hearing, that these records have been transcribed and are now contained in the permanent files of the Department of Justice.

/s/ CHARLES M. ROTHSTEIN.

Subscribed and sworn to before me this Nov. 7, 1946.

[Seal] /s/ MARY R. McLEAN,

Notary Public.

My commission expires Oct. 14, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF OLLIE COLLINS

Ollie Collins, being duly sworn, deposes and says:

First, that she was duly appointed as a hearing officer by the Attorney General and was authorized

to conduct examinations and take testimony and to make recommendations to the Attorney General as a basis for his finding, pursuant to Section 401(i) of the Nationality Act, as to whether the approval of renunciation of citizenship on the part of applicants for such renunciation would be not contrary to the interests of national defense.

Second, that in such capacity affiant proceeded to the Tule Lake Center, operated by the War Relocation Authority, at Newell, California, and conducted such hearings under the supervision of John L. Burling and Charles M. Rothstein, who were successively designated by the Attorney General to supervise, direct, and participate in the giving of such hearings.

Third, that at the said hearings the following procedures were required in all cases:

1. The rooms in which the hearings were given were located outside of the enclosure in which the applicants for renunciation and other persons of Japanese ancestry were detained (except in a limited number of emergency cases where hearings were given at the Center hospital or in the home of the applicant).

2. Each hearing was conducted in the presence of a stenographer who took a stenographic transcript of all questions and statements by affiant and by the petitioners for renunciation, respectively.

3. That the hearings were given individually, and at each hearing there were excluded from the hearing rooms all persons of Japanese ancestry

other than the individual petitioner (with the exception of infants and young children who were permitted to be brought in by a few petitioners upon request).

4. Each petitioner was specifically asked whether it was genuinely his desire to renounce his United States citizenship.

5. Each petitioner was advised fully of the consequences of his proposed renunciation and advised that it was not necessary to renounce in order to be repatriated.

Fourth, that in no case did affiant recommend approval of renunciation by the Attorney General unless she was convinced that the petitioner genuinely desired to renounce and understood the nature and consequences of renunciation, and that in each case where approval was recommended affiant was so convinced.

Fifth, that in the course of the hearings so given a very large number of petitioners volunteered, and even insisted, that their desire to renounce had been arrived at individually. No petitioner suggested in any way the existence of coercion or that their proposed renunciation was not voluntary.

Sixth, that a large number of petitioners asserted affirmative loyalty to Japan and to the Japanese Emperor.

Seventh, that a large number of petitioners appeared at the hearings with their heads shaven and wearing portions of the regalia of the nationalistic

Japanese organization which had grown up within the War Relocation Authority relocation center.

/s/ OLLIE COLLINS.

Subscribed and sworn to before me this Nov. 7, 1946.

[Seal] /s/ MARY R. McLEAN,

Notary Public.

My commission expires Oct. 14, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH J. SHEVLIN

Joseph J. Shevlin, being duly sworn, deposes and says:

First, that he was duly appointed as a hearing officer by the Attorney General and was authorized to conduct examinations and take testimony and to make recommendations to the Attorney General as a basis for his finding, pursuant to Section 401(i) of the Nationality Act, as to whether the approval of renunciation of citizenship on the part of applicants for such renunciation would be not contrary to the interests of national defense.

Second, that in such capacity affiant proceeded to the Tule Lake Center, operated by the War Relocation Authority, at Newell, California, and conducted such hearings under the supervision of John L. Burling and Charles M. Rothstein, who were successively designated by the Attorney General to

supervise, direct, and participate in the giving of such hearings.

Third, that at the said hearings the following procedures were required in all cases:

1. The rooms in which the hearings were given were located outside of the enclosure in which the applicants for renunciation and other persons of Japanese ancestry were detained (except in a limited number of emergency cases where hearings were given at the Center hospital or in the home of the applicant).

2. Each hearing was conducted in the presence of a stenographer who took a stenographic transcript of all questions and statements by affiant and by the petitioners for renunciation, respectively.

3. That the hearings were given individually, and at each hearing there were excluded from the hearing rooms all persons of Japanese ancestry other than the individual petitioner (with the exception of infants and young children who were permitted to be brought in by a few petitioners upon request).

4. Each petitioner was specifically asked whether it was genuinely his desire to renounce his United States citizenship.

5. Each petitioner was advised fully of the consequences of his proposed renunciation and advised that it was not necessary to renounce in order to be repatriated.

Fourth, that in no case did affiant recommend approval of renunciation by the Attorney General

unless he was convinced that the petitioner genuinely desired to renounce and understood the nature and consequences of renunciation, and that in each case where approval was recommended affiant was so convinced.

Fifth, that in the course of the hearings so given a very large number of petitioners volunteered, and even insisted, that their desire to renounce had been arrived at individually. No petitioner suggested in any way the existence of coercion or that their proposed renunciation was not voluntary.

Sixth, that a large number of petitioners asserted affirmative loyalty to Japan and to the Japanese Emperor.

Seventh, that a large number of petitioners appeared at the hearings with their heads shaven and wearing portions of the regalia of the nationalistic Japanese organization which had grown up within the War Relocation Authority relocation center.

/s/ JOSEPH J. SHEVLIN.

Subscribed and sworn to before me this 7th day of November, 1946.

[Seal] /s/ MARY R. McLEAN,

Notary Public.

My commission expires Oct. 14, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF LILLIAN C. SCOTT

Lillian C. Scott, being duly sworn, deposes and says:

First, that she was duly appointed as a hearing officer by the Attorney General and was authorized to conduct examinations and take testimony and to make recommendations to the Attorney General as a basis for his finding, pursuant to Section 401(i) of the Nationality Act, as to whether the approval of renunciation of citizenship on the part of applicants for such renunciation would be not contrary to the interests of national defense.

Second, that in such capacity affiant proceeded to the Tule Lake Center, operated by the War Relocation Authority, at Newell, California, and conducted such hearings under the supervision of John L. Burling and Charles M. Rothstein, who were successively designated by the Attorney General to supervise, direct, and participate in the giving of such hearings.

Third, that at the said hearings the following procedures were required in all cases:

1. The rooms in which the hearings were given were located outside of the enclosure in which the applicants for renunciation and other persons of Japanese ancestry were detained (except in a limited number of emergency cases where hearings were given at the Center hospital or in the home of the applicant).

2. Each hearing was conducted in the presence of a stenographer who took a stenographic transcript of all questions and statements by affiant and by the petitioners for renunciation, respectively.

3. That the hearings were given individually, and at each hearing there were excluded from the hearing rooms all persons of Japanese ancestry other than the individual petitioner (with the exception of infants and young children who were permitted to be brought in by a few petitioners upon request).

4. Each petitioner was specifically asked whether it was genuinely his desire to renounce his United States citizenship.

5. Each petitioner was advised fully of the consequences of his proposed renunciation and advised that it was not necessary to renounce in order to be repatriated.

Fourth, that in no case did affiant recommend approval of renunciation by the Attorney General unless she was convinced that the petitioner genuinely desired to renounce and understood the nature and consequences of renunciation, and that in each case where approval was recommended affiant was so convinced.

Fifth, that in the course of the hearings so given a very large number of petitioners volunteered, and even insisted, that their desire to renounce had been arrived at individually. No petitioner suggested in any way the existence of coercion or that their proposed renunciation was not voluntary.

Sixth, that a large number of petitioners asserted affirmative loyalty to Japan and to the Japanese Emperor.

Seventh, that a large number of petitioners appeared at the hearings with their heads shaven and wearing portions of the regalia of the nationalistic Japanese organization which had grown up within the War Relocation Authority relocation center.

/s/ LILLIAN C. SCOTT.

Subscribed and sworn to before me this Nov. 7, 1946.

[Seal] /s/ MARY R. McLEAN,
Notary Public.

My commission expires Oct. 14, 1951.

[Endorsed]: Filed Nov. 12, 1946.

[Title of District Court and Cause.]

ORDER JOINING ADDITIONAL PARTIES AS
PLAINTIFFS IN SUIT AND APPOINT-
ING GUARDIAN AD LITEM

Upon reading and filing the stipulation dated November 18, 1946, of the parties to the inclusion of additional parties plaintiff in the above-entitled suit;

It Is Ordered:

(1) That each of the following named persons be and he or she is hereby joined as a party plaintiff to the above-entitled suit and that his or her said name be added as an adult plaintiff to the list of adult plaintiffs therein; Harry Masao Hamachi and May Yoshiko Yamashita;

(2) That the following named person is hereby joined as a party plaintiff to the above-entitled suit and that her name be added as a minor plaintiff to the list of minor plaintiffs therein; Mabel Yaeko Yamashita;

(3) That Harry Uchida is hereby appointed the next of friend and guardian ad litem of said Mabel Yaeko Yamashita, a minor, and said minor is hereby authorized to appear as a party plaintiff herein by the said Harry Uchida as her next of friend and as her guardian ad litem.

Dated: November 18, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Nov. 18, 1946.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

Please enter the defaults of the defendants, Raymond R. Best, as Project Director, Tule Lake Center, and Dillon S. Myer, as Director of the War Relocation Authority, and each of them, for heretofore having appeared herein but having failed to file herein a responsive pleading to the Complaint or to the Amended Complaint herein.

Dated: December 10th, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 11, 1946.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25294-S (Consolidated No. 25294-S)

TADAYASU ABO, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc. et al.,

Defendants.

No. 25295-S (Consolidated No. 25294-S)

MARY KANAME FURUYA, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc. et al.,

Defendants.

PLAINTIFFS' AFFIDAVITS IN SUPPORT
OF THEIR MOTIONS FOR SUMMARY
JUDGMENT AND FOR JUDGMENT ON
THE PLEADINGS AND TO STRIKE DE-
FENDANTS' PLEADINGS AND IN OP-
POSITION TO DEFENDANTS' CROSS
MOTION FOR SUMMARY JUDGMENT

Contents

Plaintiffs incorporate herein as affidavits in sup-
port of their motions for summary judgment and
for judgment on the pleadings and to strike defend-
ants' pleadings and in opposition to defendants'

cross motion for summary judgment the following to wit:

1. The original Complaint filed herein by the plaintiffs on November 13, 1945, the same being verified by one of the plaintiffs for and on behalf of each and all of them, and being offered herein in lieu of filing separate affidavits of merit by each individual plaintiff.

2. The Supplement and Amendment to Complaint filed herein March 4, 1946, verified for and on behalf of each plaintiff herein, the same being offered herein in lieu of filing separate affidavits of merit by each individual plaintiff.

3. The Amended Complaint filed herein August 15, 1946, the same being verified by one of the plaintiffs for and on behalf of each and all of them, and being offered herein in lieu of filing separate affidavits of merit by each individual plaintiff.

The attached affidavits of the following persons, none of whom is a plaintiff herein and none of whom is a renunciant, but each of whom is competent to be a witness in said action, are offered in support of said motions:

1. Tetsujiro Nakamura.
2. Masami Sasaki.
3. Ernest Besig.
4. Rev. Thomas W. Grubbs.
5. Ann Ray.

AFFIDAVIT OF TETSUJIRO NAKAMURA

State of California

City and County of San Francisco—ss.

Tetsujiro Nakamura being first duly sworn, deposes and says:

I am a native-born, 29 year old male citizen of the United States of America and of the State of California, and proprietor of a retail food store situated at 400 North San Fernando Boulevard, Burbank, Los Angeles County, California.

I am a person of Japanese ancestry; I was evacuated from my home in Sacramento, California, on May 11, 1942, pursuant to the provisions of a civilian exclusion order issued by General John L. DeWitt, and was incarcerated in the Tule Lake Center, Newell, Modoc County, California, where I remained continuously thereafter until October 31, 1945, when I took up residence in San Francisco, California.

The Tule Lake Center was surrounded by a 12 foot high steel wire fence topped with barbed wire. Watch towers manned by armed guards dominated the perimeter of the Center and some were situated on the nearby hills. The administrative section of the Center where the W.R.A. Caucasian staff and personnel worked and lived was separated from the inner area or colony where the internees lived. The internees were housed in frail shacks and barracks which were poorly lighted and heated and had no plumbing conveniences. The W.R.A. staff and personnel were housed in comfortable, well constructed,

lighted and heated houses and apartments which had modern plumbing conveniences. A detachment of military police were assigned to quarters adjoining the administrative section. Soldiers patrolled the perimeter of the Center, sentries guarded the entrance and manned the watch towers. Armored tanks were kept on hand. The whole camp was kept under the point of guns.

I was employed by the War Relocation Authority at the Tule Lake Center in the capacity of Legal Aid Counsel from about January 1, 1944, until October 31, 1945, at a salary of \$19 per month, the highest classification rate of salary paid by the W.R.A. for professional services rendered by persons of Japanese lineage confined to that Center, and as such officer I was consulted by several thousand internees during the period of time I occupied that position. While in that Center I lived with my mother, father, brother and two sisters at Block 703-D in Ward 4. As the legal aid counsel I was in sole charge of the legal aid counsel office situated in Block 1608-D in Ward 1. My duties as such officer were to assist the evacuee internees in legal matters.

On May 25, 1943, the Project Directors of the W.R.A. unanimously agreed that a separate center should be set up for quartering aliens who desired to be repatriated to Japan. On June 25, 1943, Mr. Dillon Myer, National Director of the W.R.A., recommended that the Tule Lake Center be selected as the segregation center. On July 26-27, 1943, the Project Directors of all the W.R.A. centers con-

ferred in Denver, Colorado, with Mr. Myer to determine segregation plans. Residents of the Tule Lake Center petitioned this meeting to create a new center where those who wished to be repatriated to Japan would be quartered by themselves. The petition was ignored. The Tule Lake Center was decided upon as a segregation center.

In August, 1943, the W.R.A. conducted a survey in the Tule Lake Center, asking each resident whether he desired to remain in internment in the Center or be transferred to another center or be removed to Japan. The 15,000 residents were canvassed. Approximately 5,000 residents, citizen and alien, applied for transfer to other camps and were transferred while approximately 10,000 preferred to remain in the Tule Lake Center. Approximately 8,000 persons, including men, women and children, from other centers were brought into the Tule Lake Center and many but by no means all of these desired to return to Japan. This segregation plan was never completed. On October 15, 1943, the W.R.A. abandoned segregation because of the administrative problems involved. The Center had been built to accomodate 15,000 persons but 18,000 were crowded in.

The aliens desiring to repatriate with their families to Japan were dissatisfied with being confined to a camp where citizens and aliens desiring to remain in the United States were quartered. Those desiring repatriation expected to be exchanged for our citizens held prisoner in Japan in accord with

the announced plan of the authorities to send them to Japan on the exchange ship Gripsholm. The citizens were dissatisfied with having those aliens present in the camp and protested to the camp authorities but their protests went unheeded. A small committee of the aliens petitioned the W.R.A. for their segregation from those who wished to stay in this country but the petition was ignored. No such segregation took place.

The evacuation and discrimination against persons of Japanese lineage, the reports that circulated that all of us were destined by the Government to be deported to Japan, the frequency of acts of violence against persons of like lineage on the outside, the fear that alien members of our families would be deported and our families be split up, the exaction of answers in 1943 to questionnaires by the Army and the W.R.A. in 1943 that contained the notorious question No. 28 which asked us to renounce an allegiance to the Japanese emperor none of us had, our impoverishment and the hopelessness of our lot and future, worried, frightened and created a deep and abiding fear in all of us who were confined to the Tule Lake Center. This combination of real fears was nothing compared with those that yet were to beset us. At the Tule Lake Center many internees were compelled to answer the questionnaire at the point of bayonets. It was the general prevailing opinion of all evacuees that if they answered "yes" to question No. 28 therein the government would consider such answer

an admission of allegiance on their part to Japan up to that time which was false, that if they answered "no" or refused to answer that question such would be construed by the Government as an admission of disloyalty to the United States. Thousands were too frightened to know how or whether to answer that question.

When the transfers between the camps were stopped in October, 1943, the relocation office in the Tule Lake Center was closed out by the W.R.A. camp authorities. It remained closed until reopened on order of Mr. Myer in the early part of June, 1945, after the completion of the renunciation hearings, so that during the closure period none of the residents were able to apply for relocation in the United States and none were allowed to be relocated. The closing of the relocation office alarmed the whole camp, the internees feeling certain the closing was notification that all the internees would be detained and finally be deported to Japan. Hundreds of them expressed that opinion and belief to me personally.

I was in the evacuee property office one day in early June, 1945, and saw Mr. Dillon Myer, Mr. Best and other staff officers of the W.R.A. enter the adjoining room. I heard their conversation. Mr. Myer asked Mr. Best, the Project Director, how relocations from the Center were progressing and Mr. Best said that the relocation office had been closed since about October, 1943 and that no applications for relocation had been accepted since

then. Mr. Myer told Mr. Best that he was surprised to learn the relocation office had been closed out and that because a serious mistake had been made in closing that office that it must be reopened at once. Mr. Best said he would reopen it. Mr. Myer then instructed Mr. Best to send relocation workers into the camp to intermingle with the residents and to inform them the W.R.A. would consider applications for relocation. Mr. Best reopened that office the same or the next day. Workers were sent into the inner camp to spread the news and in a few days the office was swamped with applications. The applications poured in so fast that several additional relocation offices were opened to handle the volume. Practically all of the renunciants applied for relocation before the middle of July, 1945, but their applications were denied while those of aliens and children under 18 were approved.

Immediately following the abandonment of the segregation program in October, 1943, factions developed among the internees, those desiring to remain in the United States being opposed to being kept in a camp housing those desiring to go to Japan. The aliens petitioned the W.R.A., the Justice Department and the Spanish Consul protesting the presence in the camp of citizens and aliens desiring to remain in the United States and demanded that the Tule Lake Center be given over exclusively to those desiring repatriation. The petitions were ignored. To obtain their demands the leaders of the aliens desiring repatriation to Japan

formed political pressure groups in order to agitate and compel all U. S. citizens and their families in the Center to join their organizations, to force them to renounce U. S. nationality and to ask for removal to Japan. Leaders of these groups openly announced their plans and purposes and embarked upon a vigorous and openly conducted propaganda campaign among the internees to accomplish those objectives.

During the summer of 1944, while Mr. Best was absent from the Center, Mr. Harry Black, Assistant Project Director, and his assistant, Mr. Huycke, recognized the demands of the alien pressure groups which desired to be repatriated. They assigned to those groups the High School auditorium once per month to be used for their meetings and also provided separate office space for them in Ward 5. The groups were called the Hoshi Dan (adults' organization), the Sokuji Kikoku Hoshi Dan (youths' organization) and the Joshi Dan (girls' organization). These organizations originally were devoted to preparing those going to Japan to take up life in that country by studying its language, culture and customs but long since had gone far beyond those purposes. They were allowed to keep on using the auditorium and offices until after the renunciation hearings had been completed in July, 1945.

On November 4, 1943, a group of Caucasian internal security policemen severely beat eighteen internees in the police squad room in the Center

without justification. The 18 were severely beaten with baseball bats and were hospitalized, several requiring hospitalization for several months and the mentality of one was impaired permanently as a result of the beating he had received. An investigation was conducted by the W.R.A. authorities into the beatings but they did not disclose their findings. Knowledge of this mistreatment of internees intensified the fears of all the internees.

On November 4, 1943, the troops were called into the inner camp to suppress a riot which never occurred and which was never even threatened. The armed troops drove every resident indoors at the points of bayonets and then forcibly and violently searched every internee, man, woman and child, and every apartment, house and barrack. This generalized search continued daily and nightly until about November 12, 1943. Thereafter, periodically until about March 1, 1944, when the troops were removed altogether from the Center, indiscriminate forcible searches were conducted by the troops of hundreds of internees and their quarters. Hundreds of internees were arrested by the troops and were detained in isolation quarters for days and months without any charges being brought against them and without any hearings being given them on the reasons for their detention. These violent searches and seizures kept the whole camp in a constant state of worry, despair, wild fear and terror of troop violence.

On May 16, 1944, Jimmy Okamoto, a citizen

internee, while driving a construction truck for the W.R.A. stopped his truck at the entrance gate to the camp where, without provocation, he was shot and killed by rifle fire by a young soldier, an M.P. The W.R.A. authorities complained to the Colonel in charge of the troops for the unprovoked outrage. An army board subsequently exonerated the soldiers but transferred him from the camp. As a result of protests by the W.R.A. and public protest over this incident the troops shortly thereafter were removed from the Center and W.R.A. internal security police were substituted as guards in lieu of soldiers and these were armed with revolvers instead of rifles. The shooting of this boy filled the whole camp of internees with an unspeakable horror and a deep fear because of the want of protection accorded the internees against outbursts of violence against them. Panic reigned in the camp.

On July 2, 1944, Yaozo Hitomi, a loyal alien who was manager of the canteen and who enjoyed the confidence of the W.R.A. and the internees and was an outspoken opponent of the pressure groups then existing in the camp, was assaulted at night and murdered by a gang in front of his brother's house. His throat was cut with a knife. This murder further alarmed and frightened the whole camp.

From on or about March 1, 1944, until about August, 1945, the internal security police conducted thousands of forcible searches and seizure of the

persons and properties of internees. In excess of 450 citizen internees ranging from 17 years upward in age were seized by them and thrown into The Stockade, a prison maintained by the W.R.A. in the Center, and there were kept incommunicado for periods ranging from 1 day to 11 months without any charges being filed against them and without being given any hearing on the reason for their arrest and imprisonment. These frequent violent searches, seizures and arrests developed a chronic fear in the internees of police violence and a belief that the W.R.A. did not wish to protect but to harass and oppress them.

The police, however, took no action whatever against the pressure groups which were operating openly in that Center with the full knowledge, consent and permission of the W.R.A. authorities until they were ordered so to do by Mr. Best during the time the renunciation examinations were being held and then did nothing except to raid those offices and confiscate their office records, pictures and emblems. They did not arrest any of the leaders of those organizations. These brutal search and seizure practices spread panic among the internees, all of whom lived in momentary fear of being seized, jailed and held incommunicado. Life in the Center became one of bewilderment and stark fear. All of us were in the most abnormal state of mind imaginable. Several persons were driven insane. All of us lived in a constant state of fear and terror, being harassed, menaced and threatened by members of

the pressure groups against which the W.R.A. provided no protection.

Daily from about the middle of November, 1944, until sometime in July, 1945, that is, long before the renunciation hearings were held in the Center and during the progress of those hearings, I personally talked about renunciation with in excess of 3,000 of the citizen internees who were scheduled for renunciation hearings or about to be scheduled for such hearings and also with hundreds of parents and relatives of citizen internees. Those to whom I talked were men, women and children from 18 years upward. I talked to them in my office where they came to see me, at their homes and at my home and elsewhere in the camp. I advised each of them against renunciation. Without exception each citizen to whom I talked told me that he believed and knew he had been discriminated against by the Government and ever since his evacuation had been treated as though he were a hostile alien enemy; that the citizens of Japanese ancestry serving in the Army had been discharged from active service in 1942 and were denied the right to fight for this country and that they and all males of like ancestry had been given a 4-C draft classification in late 1942 and thereby had been officially and falsely branded by the Government as "alien enemies"; that he had been interned and deprived of all the rights of citizenship for years simply because of his Japanese ancestry; that the Government had abandoned him and all Japanese in this

country and wished to deport them and intended to deport them to Japan; that the Army authorities during their confinement in relocation centers in 1943 and the W.R.A. in the W.R.A. centers in 1943 had used a trick and device to trap them into making a false statement or oath in questionnaires in which they were compelled, under Question 28 therein, to admit they had an allegiance to Japan which they were to renounce; that his future life in this country was impossible because of the community hostility raging against persons of Japanese ancestry on the outside which had resulted in hundreds of beatings and assaults on persons of Japanese ancestry; that relocation in this country had been denied him without cause; that he was scheduled for internment until his deportation to Japan was arranged by the Government through the medium of the exchange ship Gripsholm; that the Government intended to deport him and that it had authorized the Hoshi Dan, the Hokoku Seinen Dan and the Joshi Dan to open offices in the camp for the purpose of carrying on agitation in the camp to obtain renunciation from the citizens and that the Government wanted the renunciations of all the citizens; that the Government authorized the opening of the Japanese language schools in the Center for the purpose of having them learn the Japanese language, culture and customs to prepare them for life in Japan when they were deported; that if he did not renounce he would be subjected to violence by the pressure groups and gangs which had threat-

ened him and his family members with violence if he failed to obey the leadership of those gangs and refused to renounce; that he and his family would be assaulted and subjected to violence if the didn't join those organizations; that anyone who opposed the leadership of the organizations and failed to renounce and request transfer to Japan would, when finally deported to Japan, be reported to the Japanese authorities and there be imprisoned and mistreated for being loyal American who had opposed the pro-Japanese organizations and the leaders of those organizations; that the aliens were all scheduled for removal to Japan and that if the citizens did not renounce the aliens would be removed to Japan and the citizens would be held in internment and be deported to Japan at a later date and that their families would be split up by such a practice. These beliefs, views and fears were shared by nearly every person interned in the Center.

Among those to whom I talked there were at least 50 veterans who had served in the Army, had received honorable discharge in 1942 when the Government adopted the policy of relieving them from active military service simply because of their Japanese lineage and thereafter had given them a draft classification of "alien enemy," that is, "4-C" draft classification.

A number of these citizen internees stated to me that they had been compelled by threats made by leaders of those gangs to join the organizations as nominal members so that they and their families

would not suffer physical harm from those gangs against which harm the W.R.A. authorities had not given and would not give them any protection; that they did not dare to resign from membership because of fear of bodily harm if they tried to do so; a number of these told me that when they first learned the true nature of these organizations and that these organizations were neither devoted nor interested in cultural pursuits but devoted to disloyal pursuits they had tried to resign; that upon attempting to resign that leaders of those organizations tried to exact written resignations from them which those leaders said they would present to Japanese authorities when they were deported to Japan and there the resigners would be arrested, imprisoned and mistreated for being loyal to the United States, for being American spies or persons who had tried to thwart the pro-Japanese movement in the Center. Their beliefs and fears were genuine and well founded. All the internees for a long time had been living in a state of growing danger, mass-hysteria and terror and none of us were acting or responding as normal persons. It was impossible to do so.

Of my own knowledge and personal observations I state that the W.R.A. authorities took no steps to abate or halt the activities of the pressure groups until after the renunciation hearings had been completed in the Center in July, 1945, but the Justice Department removed a few of the leaders of those groups between January and March of 1945,

to other internment camps. It decided against removing the remaining leaders and the groups remained active all during the progress of the renunciation hearings. The failure of the W.R.A. to protect the citizen internees and their families against the propaganda campaigns of the pressure groups and the subversive activities of those groups left them in a helpless and hopeless condition, a prey to the rumor mill, fear, distress, worry and despair. It was useless for internees to complain to the W.R.A. for protection they were not receiving and they were afraid to complain. They feared that registering complaints would expose them to reprisals from the gangs and those fears were real and justified.

Approximately 1,300 citizens in the Center did not renounce. These were either from remote blocks in the Center where the pressure groups were least active or worked in the administrative section of the Center during the day and hence were free from the pressure and intimidation of the gangs or were persons who were sane and clever enough to lead the pressure groups to believe they had applied for renunciation.

Following their particular renunciation hearings I personally talked to not fewer than 2,000 citizens concerning their renunciations. They still held their same beliefs and fears. Several hundred of them told me that they had not written any requests for renunciation application forms; many of them telling me they had received those forms in the mail

from the Government but that they had not solicited the forms; many stated that the Hoshi Dan office had written to Washington in their names requesting the forms be supplied to them; many stated that the Hoshi Dan office had prepared the application forms and ordered them to sign; hundreds of them stated they had been ordered by Hoshi Dan leaders to submit to and that they had submitted to coaching courses the Hoshi Dan had organized and conducted in advance of the hearings for the purpose of coaching them to answer questions which it was expected the government examiners would propound to them and which the government examiners did ask as the hearings progressed; that they had done so and that, under fear of and under the compulsion of the Hoshi Dan they had given the stereotyped answers to the examiners at their renunciation hearings which they had been ordered to give by the leaders of those groups and that the answers were false and untrue but were given by them because of the threats made against them by the gangs and their belief and fear that if they had not done so they and their families would have been assaulted and harmed by the gangs; that they had not wanted to renounce but that they did not dare to tell the government examiners so for fear the pressure groups goon squads would harm them and their families and because they believed and feared the government examiners were not sympathetic to their plight and would not have believed

them in any event because they were agents of the government which desired their renunciations and intended to deport all of them and their families regardless.

I do not know of a single person who renounced of his own free will or of any person who renounced while in his proper mind. Before the renunciation hearings were commenced there were frequent assaults conducted by individuals and by goon squads controlled by the pressure groups upon internees who spoke out against those groups and against renunciation, many such assaults occurring during daytime but most occurring during the night time. The whole camp was kept so frightened during the renunciation period and for a long time prior thereto that nearly all the internees kept to their homes or barracks at night and very few ventured forth in the dark for fear of being assaulted. The great body of the internees lived in constant fear and terror of the pressure groups which completely dominated and controlled the camp during the renunciation period and for several months before it was started. They were all caught up in a condition of mass-hysteria and fear. The acceptance of renunciations from terrorized citizens living in internment, shut off from the outside world and from knowledge of that world, was just like accepting renunciations from inmates of a gigantic insane asylum.

The Japanese language schools which the W.R.A. fostered in the Center for the purpose of preparing

repatriates for a future life in Japan were dominated and controlled by alien fanatics. These aliens aided the Hoshi Dan, the Hokoku Seinen Dan and Joshi Dan leaders in their propaganda activities. They converted these schools into forums for those purposes. They agitated for renunciations and repatriation to Japan. Citizen students who attended the schools in response to parental obedience to alien parents who desired repatriation by degrees found themselves helplessly caught in the toils of these disloyal teachers and didn't dare protest. As a condition of attendance children were compelled to have their heads shaved. I paid a number of visits to these schools before and during the renunciation period. I reported the facts of such agitation and propaganda dissemination by the teachers to my superior, Mr. Lou Noyes, the Project Attorney, on many occasions. No action, however, was taken against the agitators. The children in these schools were left in a helpless condition. The staff of the W.R.A., the W.R.A. Caucasian employees and internal security police at all times were fully aware of the purpose to which these schools were being put and of the helpless condition of these American children but did absolutely nothing about it.

In March, 1945, Masami Sasaki, Kaoru Takahashi, adult aliens loyal to the United States, and I tried to form a group of internees to combat the threats of the pressure groups and to offset their influence and to conduct a campaign against the

fear and terror they instilled in the citizen and alien internees and to speak against renunciations. I wrote to the Japanese American Citizens League in Salt Lake City pleading with that organization to do something to save these citizens and loyal aliens from the pressure groups and renunciations and received a letter from Mr. Saburo Kido, the president of that organization, stating that his organization was not able to do anything about it. Our efforts were unsuccessful because the camp was wholly dominated and controlled by fear of the pressure groups. We could gain no assistance from the outside world or the W.R.A. and the internees were too frightened to do anything except submit. I received several threats from the gangs and my mother, father, brother and two sisters were panic stricken for fear that my life was jeopardized by my actions. Although I lived in a state of fear and was afraid of being beaten up by gangsters in the camp I did what I could. The two girl stenographers assigned by the W.R.A. to work as my stenographers in my office in the Center, however, were unable to withstand the pressure and both renounced because of the fears and terror the pressure groups inspired in them. My efforts to persuade them not to renounce were unavailing.

I spoke to Mr. Lou Noyes, the Project Attorney, my immediate superior, in his office in January, 1945, before renunciation hearings were started. I told him of the activities of the pressure groups and of the threats and acts of violence of which

they had been guilty, of their agitation and propaganda program, of the great fear and terror in which the citizens and their families were held by them. I stated to him that none of them would renounce except for the fear and terror in which they lived and were held and told him that probably all of them would renounce if renunciation hearings were held in the camp and that probably none of them would renounce if the hearings were held in Sacramento or anywhere outside the Center where the influence and fear of the pressure groups could not be felt. Mr. Noyes' reply to me was that holding hearings elsewhere than in the Center would be undemocratic because if the hearings were held outside the Center each person would have to travel to that place at his own expense and that, in consequence, only the few financially able ones would be able to go and the great majority who were poverty stricken could not afford to defray their expenses to such a hearing place. Mr. Noyes also told me that the W.R.A. was not assisting and would not assist the Justice Department in the renunciation program and that it was maintaining and would maintain an off-hands policy. He also told me that he had informed Mr. John Burling of the Justice Department who then was in the Center of the activities of the pressure groups and the coercion those groups had placed and were placing on the interned citizens to apply for renunciation and of the threats and act of violence of which those groups had been guilty in accomplishing their purposes. Thereafter, and until the renunciation

program was completed I reported the activities of the pressure groups and the coercion exerted on the citizens to renounce to Mr. Noyes and discussed the facts with him and also with Mr. Marvin Opler, an anthropologist who was on the W.R.A. staff as the "community analyst," on many occasions but, so far as I know and have been able to learn, neither they nor any other member of the W.R.A. staff or personnel did anything about it because it was the established policy of the W.R.A. to maintain a hands-off policy on the matters.

Everyone on the W.R.A. Staff, the Caucasian police and employees of the Center saw and knew of the activities of the pressure groups and the terror in which the internees were held and discussed it constantly but nothing was done about it.

So far as I know no one in the Center or outside did anything to alleviate the fears and terror in which the citizen internees and their families and the loyal aliens lived and were held until the renunciation examinations had been completed with the single exception of Mr. John Burling of the Department of Justice. I met him and was introduced to him when he visited my office in the "colony", the inner internment area, with the government examiners, Mr. Rothstein, Mr. Shevlin, Miss Collins and Miss Scott and a girl stenographer sometime during March, 1945. Mr. Burling, on January 25, 1945, while present in the Center wrote a letter to Masao Sakamoto, the chairman of the Sekuji Kikoku Hoshi Dan, and Tsutomu Higashi,

chairman of the Hokoku Seinen Dan, both of whom were aliens, warning them and their organizations to cease their disloyal activities and to stop the physical violence of which they and their organizations had been guilty and to stop the pressure they had been placing on residents of the Center. Mimeographed copies of his letters were posted in all the mess-halls, the block-managers' offices and latrines and hundreds of copies were supplied by him to the internal security police office for distribution to the internees. From my own knowledge and observation I state unreservedly that the activities of the groups, the pressure they put upon the internees and the threats of the leaders of those organizations and the demonstrations of force they openly displayed in coercing citizens to renounce and to apply for removal to Japan neither abated nor halted but, on the contrary, the subversive activities of those leaders increased in intensity and flagrancy until the renunciation program was concluded in July, 1945. I obtained a copy of that mimeographed letter signed by Mr. Burling from the internal security office in the Center and kept the same in my possession thereafter. That letter reads in part, as follows:

"I am well aware that your two organizations have put pressure on residents of this Center to assert loyalty to Japan and that in a number of cases physical violence was employed. . . . It is as treasonable to coerce others into asserting loyalty to Japan here as it would be outside. All these activities will stop.

“What is intolerable is that the activities of your two organizations continue. Since those activities are intolerable, they will not be tolerated but, on the contrary, will cease.”

Despite Mr. Burling's letter neither the pressure put on residents by the organizations to renounce nor the number of cases of physical violence was stopped. Instead those activities were stepped up and increased in intensity.

Mr. Burling and the government examiners, Charles M. Rothstein, Joseph J. Shevlin, Miss Ollie Collins and Miss Lillian C. Scott, spent a few weeks in the Center in the administrative section of the camp but only a few moments in the inner area, the colony where the internees were confined, consequently, he and they were able to gain only a fleeting view of conditions there and a superficial knowledge of what was going on in the inner area and then only from hearsay from the W.R.A. personnel. The W.R.A. was not interested in directing his and their attention to the true conditions existing in the camp but in suppressing knowledge thereof because it reflected upon the W.R.A. management of the Center.

Mr. Burling and those government examiners were not acquainted with the Japanese language which was the tongue most used in the Center. He and they did not associate with, live with or talk to the internees in the inner area. He and they had an opportunity to observe and did observe several demonstrations of the Hoshi Dan, the Hokoku Sei-

nen Dan and the Joshi Dan from a distance. The demonstrations took place near the barbed wire fence which separated the inner area from the administrative section of the Center where Mr. Burling and those government examiners had their apartments. If Mr. Burling and his staff of examiners had been acquainted with the Japanese language and had spent a few days or weeks in the inner area and had associated with the internees they would have observed and been familiar with the active terror that governed the internees and caused the renunciations. Mr. Burling's letter, however, was widely circulated in the Center and did bolster the courage of some of us. If the Department of Justice or the Immigration Service had been placed in the management and control of the Center instead of the W.R.A. the pressure organizations would not have been able to exist or to exercise any influence or to terrorize the internees and no renunciations would have been made.

With very few exceptions all my talks with internees in the inner area of the Center from about October, 1944, to July, 1945, were carried on in the Japanese language. The internees were afraid to speak in English and they were afraid to speak to Caucasians in the Center because the pressure groups had threatened the whole camp and warned them that if they spoke English or associated with or talked to Caucasians they would be assaulted or punished. As a result practically none of them spoke English and only those who were employed by the

W.R.A. in the administrative area came in contact with the Caucasian personnel and spoke English to them in connection with their work but their fear of the pressure groups was so great that they spoke Japanese among themselves. It was notorious that the pressure group leaders shortly after they first were organized set up and maintained a widespread spy system in the camp until the middle of November, 1945. It was through this means the leaders of the groups kept the camp under their heels. The W.R.A. authorities were cognizant of these facts at all times.

Through the medium of the Japanese language schools which the W.R.A. authorities openly allowed to operate in the inner area from the latter part of 1943 to sometime during November, 1945, and which were taught by alien teachers young children were compelled to submit to the indoctrination of disloyal ideas. Those schools were notoriously devoted to the dissemination of Japanese propaganda. The children were forced to participate in Japanese exercises and to listen to the virtues of Japanese militarism and the Japanese way of life extolled. Their parents, in response to the pressure placed upon them by the leaders of the pressure groups and the fear they entertained of harm from those sources, were compelled to send their children to those schools. They feared for their own personal safety and for the safety of their children. The alien parents and their children were helpless. The parental duress the alien parents were forced to exert on

their children to attend these schools, to renounce and request to be sent to Japan and the obedience of the children in obeying was caused by the fear in which the parents and children were held by the leaders of those groups. The alien parents were helpless and their children were helpless in the face of the dangers which they confronted. The W.R.A. authorities were fully aware of this terrible condition but they did nothing to stop it.

I have read the original letter of Honorable Abe Fortas, Under Secretary of the Interior, addressed to Mr. Ernest Besig, Director, Northern California Branch, American Civil Liberties Union, 216 Pine Street, San Francisco 4, California, and dated Aug. 6, 1945, which said letter now is in the possession of Wayne M. Collins, Esq., Mills Tower, San Francisco, California. From my own personal observation and knowledge I know and assert that the facts recited in paragraph No. 1 on page 1 thereof reading as follows:

"1. When Tule Lake became a segregation center, WRA adopted a policy of permitting evacuees to operate Japanese language schools and engage in Japanese cultural activities, in recognition of the fact that many of the residents sincerely desired repatriation to Japan and that their children should be given an opportunity to become acquainted with Japanese culture. Unfortunately this policy was utilized as an entering wedge by a number of strongly pro-Japanese evacuees for the formation of virulently pro-Japanese nationalistic organiza-

tions. These evacuees were motivated chiefly by the desire to attain standing in the eyes of the Japanese government and obtain positions of leadership in the colony. To this end they instituted Japanese-type military drill, mass exercises, bugling, wearing of Japanese insignia, emperor worship, ceremonials, pro-Japanese demonstrations, and other purely Japanese nationalistic activities designed not to serve any cultural purposes but to instill in the Tule Lake people a fanatical devotion to the principles of the militarist regime in Japan. By preying on fear of Selective Service they induced parents to exert pressure on their children to join the organizations. In addition they resorted to intimidation, threats of violence and actual violence in coercing residents to join the organizations and participate in their demonstrations. It was primarily due to the pressures of these organizations that over 80 per cent of the citizens eligible to do so applied for renunciation of citizenship this past winter. When Department of Justice representatives arrived at Tule Lake to conduct hearings on applications, the organizations stepped up their demonstrations and their pressures on the applicants. Undoubtedly many of the applicants were in the grip of the emotional hysteria created by these organizations, or actually acting under fear of violence, in confirming their desire to renounce citizenship during the hearings. The general uniformity of the answers given indicated that the applicants were well coached. These facts are re-

flected in an increasing volume of cancellation requests from Tule Lake renunciants, who frankly state in many cases that they were acting under compulsion in renouncing their citizenship.

On January 19, 1945, Mr. John Burling, special representative of the Attorney General conducting renunciation hearings at Tule Lake, addressed a letter to the heads of the two principal organizations setting forth the position of the Department of Justice toward the activities of the organization. A copy of that letter is enclosed (Exhibit I). In that letter Mr. Burling, speaking for the Attorney General, strongly condemned the activities of the organizations and stated that they must stop. Despite this letter, which was widely circulated in the center, the activities of the organizations did not abate. In order to maintain peace and order, protect the Tule Lake residents who were loyal to this country or who disagreed with the aims and objectives of the organizations, and to stop the subversive activities of these groups, two steps were taken. One was the transfer of the known alien leaders of the organizations (including persons who had renounced their citizenship) to internment camps. The other was the adoption of the special project regulations prohibiting the overt demonstrations which were fundamental to the organizations' programs.

As a result of these two steps the organizations have lost much of their prestige. Many evacuees who joined the organizations have notified WRA

of their withdrawal from membership. Opposition to the organizations has come out of hiding. Nevertheless the influence of the organizations is still strong, and their activities continue."

to be a true, correct and accurate recital of facts of which I also have firsthand knowledge and saw and heard and had cognizance of while I was a resident of the Tule Lake Center, as aforesaid.

The internees long were shut off from the rest of the world. It long had been the established policy of the W.R.A. to exclude visitors from the center. Even veterans of the army returning from the European and Asiatic theatres of war in 1945 only to find their brothers, sisters and parents interned in the Tule Lake Center because of their Japanese lineage found it difficult to obtain permits to visit them in the Center.

The intense fear in which all the internees were held by the pressure groups did not slacken until immediately following a visit of attorney Wayne M. Collins who had been called for help by a number of them in the latter part of July, 1945. He was the first person from the outside world to inform them of their rights and to endeavor to allay their fears. When he re-visited the camp in early August, 1945, a steady stream of persons talked to him and he informed them that he would take action on their behalf to relieve them from the duress in which they were held and that if the W.R.A. would not give them protection against the pressure groups he would see that they received pro-

tection nevertheless. From the time of his visits the fears of the internees commenced to subside, especially after he filed in the U. S. District Court for the Northern District of California, Southern Division, in San Francisco, mass proceedings in habeas corpus and mass suits in equity on behalf of a large number of them seeking their release from detention and the rescission of their renunciations. When the first group of alien leaders were repatriated on November 25, 1945, the camps indicated a subsidence of fear and when the last of those leaders were removed to Japan on February 23, 1946, a degree of normalcy returned to the camp.

/s/ TETSUJIRO NAKAMURA.

Subscribed and sworn to before me this 23rd day of November, 1946.

[Seal] /s/ ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

AFFIDAVIT OF MASAMI SASAKI

State of California,
City and County of San Francisco—ss.

Masami Sasaki being first duly sworn, deposes and says:

I am an adult male, 57 years of age, residing at 424 South Lorena Street, Los Angeles, California;

I was born in Japan and voluntarily emigrated to the United States when I was eighteen years

of age, coming to this country alone because of the opportunities the United States held out to me and because I was dissatisfied with life in Japan and was opposed to its militaristic regime.

In December, 1941, I was taken by an agent of the Federal Bureau of Investigation from my home in Los Angeles because I was of Japanese lineage and finally, in May of 1944, I was confined along with thousands of other persons of Japanese ancestry in the Tule Lake Center, Newell, Modoc County, California, from where I was released and was permitted to relocate in this country in December, 1945, and did return to Los Angeles where I now reside.

While I was detained for being an alien at the Santa Fe Internment Camp in New Mexico I signified my willingness in May, 1943, to serve in the United States Army.

When I arrived in the Tule Lake Center in May of 1944 there was no relocation office maintained by the W.R.A. and there was no such office in the inner area where the internees were confined until one followed by several branch was opened in June of 1945. Consequently, none of us who were confined to that Center were able to file applications for relocation in the United States until those offices were opened in June of 1945. Because of the activities of the pressure groups which were operating in the inner area at all times during the time I was confined to the Center and until the renunciation examinations given by Mr. Burling, Mr. Rothstein, Mr. Shevlin, Miss Collins and Miss Scott

were practically completed the internees, including my wife, Shigeko Sasaki, and I, did not dare try to leave the inner area and go to the administrative office in the outer part of the Center to try to apply for leave clearances because of the fear that if we did so the fact would be reported to leaders of the pressure groups and our lives be endangered thereby. I do not know of a single person who dared to go into the administrative section to try to ask for leave clearance until those relocation offices were opened. It was notorious that the pressure groups maintained a spy system during that time and that anything that was done in the Center was made known to their leaders. It was known to all of us in the inner area that many persons were beaten by members of the pressure gangs and that many were threatened with violence by them for opposing their purposes and actions.

In the latter part of 1944 the Hoshi Dan and the Hokoku Seinen Dan, two organizations led by aliens who wished to be repatriated to Japan, were organized. They set up Japanese language schools of their own in their own homes in the inner Center. They forced their own children to attend these schools. They intimidated hundreds of parents and coerced them into sending their children to such schools and to other Japanese language schools which were in operation in the Center. American children were compelled to attend those schools. In those schools the alien teachers who were to be repatriated to Japan taught about the glories of Japan

and steadily endeavored to indoctrinate them with pro-Japanese sentiments and to transform them from Americans into Japanese.

The W.R.A. allowed the pressure groups, the Hoshi Dan and the Hokoku Seinen Dan to use a number of the mess-halls in the inner areas as meeting places. The "Greater East Asia Language Schools," one of which was situated in Block 25 in a recreation hall, one in Block 30 in living quarters and one in Block 50 in living quarters, were the worst of the lot. In those schools teachers emphasized military training, Japanese calisthenics, and taught the children that Japan would control the destinies of the world and that they must become Japanese, must renounce American citizenship and request to be sent to Japan. I heard these facts from many students and from parents who were compelled by the pressure groups leaders to send their children to these schools. The Greater East Asia Language Schools closed down when a number of the leaders of the pressure groups were arrested and removed from the Center by the Justice Department sometime in March, 1945. Until that time, however, the W.R.A. did not interfere with them. Similarly conducted Japanese language schools continued to engage in like teaching until about October, 1945, and were not interfered with by the W.R.A. or the Department of Justice.

Pressure groups were in operation in the inner area when I arrived in the Center in May, 1944. These groups sometime during the summer or fall

of 1944 developed into the organizations thereafter known as the Hoshi Dan and the Hokoku Seinen Dan. These organizations, as were their predecessor pressure organizations, were the outgrowth of the alien groups which desired to be repatriated to Japan and had been confined to the Tule Lake Center for that purpose. The segregation of aliens desiring to be repatriated to Japan from those persons wishing to remain in the U. S. was never carried out.

The known purposes of these organizations were to get American citizens to renounce their American citizenship and ask to be sent to Japan and to get the aliens to ask for repatriation to Japan and to get the alien parents of American children to force their children to renounce and ask to be sent to Japan. These organizations held meetings openly in the inner area in mess-halls allotted to them by the W.R.A. They met at least three times per week. They also had the W.R.A. set aside to them for their meetings the high school auditorium on occasions. It was commonly known to the people in the Center that at these meetings disloyal speeches were made by alien leaders of the organizations who intended to be repatriated to Japan. The leaders formed strong-arm squads of committees made up of experts in judo and kendo and of ruffians and gangsters some of whom were given to carrying sticks and clubs. These gangs walked about the camp during the day and stalked about the camp at night. I saw such gangs many times so armed.

The most infamous leaders of the Hoshi Dan were Tachibana and Tesho Matsumoto, both aliens, both of whom now are in Japan.

The Hoshi Dan spread the report through the camp that if any of the internees exposed their activities to the authorities they would be considered "informers" which they called "Inu," that is to say, dogs, and would be beaten up or be killed. The whole camp feared that those threats would be carried into execution if anyone did so and, consequently, internees feared to be seen with or talking to Caucasians for fear they would be considered informers. It was common knowledge among us all that the pressure groups had a spy system operating in the camp and that anyone who criticized or reported their activities or who denounced their purposes and activities would be reported to the leaders of the pressure groups and would run the danger of being assaulted by their strong-arm gangs. All of us lived in daily danger and a state of terror as a result. The authorities did not interfere with them and did not protect the internees against their activities until some of the leaders were removed from the Center by the Justice Department in the spring of 1945.

The pressure group leaders and their strong-arm squads threatened anyone who said he was opposed to them with violence. They threatened with violence anyone who dared to speak out against their propaganda campaign, or against renunciations or against requests for removal to Japan or against

the language schools. They intimidated parents into sending their children to those schools. They sent strong-arm gangs each consisting of 2 to 3 persons to canvass all the internees and to intimidate the citizens into renouncing and applying for removal to Japan and the aliens into applying for repatriation to Japan. We heard of many persons being threatened and assaulted for opposing their movement. We heard about such threats and assaults nearly every day. All of us were frightened by them.

I first saw pressure groups marching in the latter part of 1944 in the inner area between the wards in the Center. I saw five such groups drilling and engaging in Japanese calisthenics in one day, each containing between 200 and 300 persons. They made it a practice about 5:30 a.m. each morning to blow the "Kimigayo," the Japanese national anthem, on their bugles. At 6 a.m. these groups assembled between the wards, knelt, bowed in the direction of Japan, then rose and commenced marching. Their heads were shaved. They wore rising sun flags sewn on their coats and sweaters with the word "Ho" appearing thereon which is symbolic and means "submission to the emperor." They repeated the performance each morning. They marched in military formation. From my apartment I heard their officers shout Japanese military commands and I saw them obey those commands.

Each Sunday all those groups assembled and formed a large marching unit in the inner area fac-

ing the Administration Building in the administrative section in plain view of the Caucasian W.R.A. staff and personnel and separated from them only by a high steel wire fence. From a distance, on about five Sundays, during October, November and December, 1944, I saw dozens of the Caucasian staff and personnel watch them from the administrative side of the fence. I saw many members of the Caucasian internal security police force both inside the inner area and in the administrative section watch them while the unit went through its performance from assembling to marching.

I saw a small group of the pressure groups many times drilling in Japanese military formation in the area behind the barrack in which my wife and I had our one-room apartment where we cooked, slept and lived. The numbers of the marchers in the small groups increased from about 150 in number in December, 1944, to about 300 in March, 1945. The large unit, a combination of the five small groups, which I saw marching on Sundays totaled about 1,500 persons nearly all of whom were aliens and their children who desired to be removed to Japan. Practically, if not all of these marchers, who remained in the Tule Lake Center were repatriated to Japan from December, 1945, to February, 1946, as were those of them who were transferred from the Center to other internment camps in the spring of 1945.

I reported to Mr. Lou Noyes, the W.R.A. Project Attorney, sometime during January, 1945, at his

office in the administrative section that the Hoshi Dan and Hokoku Seinen Dan strong-arm squads had intimidated and were continuing to intimidate citizens into renouncing citizenship and were compelling parents to pressure their children into renouncing and asking for removal to Japan and that these strong-arm squads were guilty of many acts of violence in the camp and were constantly threatening anyone who opposed their actions. Mr. Noyes then said to me that the W.R.A. would not do anything about it and that it was a problem for the Justice Department to handle. Mr. Tetsujiro Nakamura, who is a citizen of the United States and who was the W.R.A. Legal Aid Counsel, who had his office in the inner area, was present in the office of Mr. Lou Noyes when I had that conversation with Mr. Noyes.

In the early part of February, 1945, Mr. Tetsujiro Nakamura, the W.R.A. Legal Aid Counsel; Mr. Jutaro Narumi, Mr. Z. Okubo, the chief of the block managers, and Mr. Kaoru Takahashi and my wife and I met in secret at my one-room apartment in Block 51, Barrack 11, Apartment C, in the inner area. Mr. Nakamura is a citizen of the United States and the rest of us who attended that meeting are aliens who always have been loyal to the United States. We then and there constituted ourselves a group for the declared purpose of opposing the pressure groups' propaganda, disloyal activities and influence in any way we could. Because of the personal danger to ourselves we had

to talk to internees secretly against the pressure groups and against renunciations and we did so. In March of 1945 we tried to form an active group on a larger scale to combat the pressure groups. We resolved to seek outside aid to help the internees against the terror that reigned in the inner area. Although we were all frightened about what we were doing and intended to do because of our fear of the pressure groups and believed our lives to be in danger from them were our purposes to become known, we instructed Mr. Nakamura to write to the Japanese American Citizens League and ask for the help of that organization. We held meetings of this little group about five times per week. Mr. Nakamura wrote the letter and showed us the original and we approved the letter and its contents, and he mailed it. No answer was received for over a month and then Mr. Nakamura produced the answering letter from Mr. Saburo Kido, the president of the Japanese American Citizens League, which stated in substance that his organization could not assist us. Nevertheless, each of our little group advised individuals against the pressure groups and against renunciation even though we had to do this in secret because of the great danger of bringing harm upon ourselves and those to whom we talked. The whole camp was in great fear of the pressure groups all during the renunciation period.

All of us who were interned, citizens and aliens alike, believed and expected that the Government in-

tended to keep us all interned until it deported all of us to Japan. These general beliefs instilled us all with fear. All of us were held in the grip of terror of the pressure groups and lived in constant danger of harm from their strong-arm gangs. Those groups spread Japanese propaganda throughout the Center—they spread rumors—they spread threats of violence against anyone who spoke against renunciation and against anyone who opposed their principles and objectives—they spread the news that anyone who opposed them would be reported to the Japanese governmental authorities when they were deported to Japan and that anyone who refused to renounce citizenship would be deported in any event and on arrival in Japan would be reported as having opposed them and as being loyal to the United States and there would be arrested and imprisoned for having so done. They brought pressure to bear on parents of citizens to compel their children to renounce.

Both before and during the progress of the renunciation examinations it was well known in the Center that citizens had been compelled to submit to coaching courses that the Hoshi Dan conducted. In those courses citizens were ordered to give stereotyped answers to the questions the government examiners were expected to give them. Those coaching schools were in operation all during the time those examinations were being given so that the coaches knew the questions that were being asked. It was a matter of common knowledge to the residents of

the Center that citizens were ordered by the Hoshi Dan leaders to tell the government examiners that they wished to renounce of their own will and that if they told the examiners they had been coerced into applying for renunciation that they would be punished by Hoshi Dan gangs.

Many citizens were compelled to join the Hoshi Dan and Hokoku Seinen Dan as nominal members to save themselves and their families from violence at the hands of their strong-arm gangs. Many citizens who joined them as nominal members told me they had been under compulsion so to do because of threats made against them and their families. Many of these told me that they had been forced to join and that they did not dare to resign because the leaders and gangs said that if they did not join and that if they resigned they would be reported to the Japanese governmental authorities when they were deported to Japan and there would be punished for having opposed the organizations.

From my own observations I state that every internee was constantly subjected to the menace of the pressure groups. Each was in constant fear of harm from those groups. The whole camp was terrorized by them. The failure of the W.R.A. to protect them against that terror added to their fears. Nearly all those to whom I talked in the Center during the renunciation period secretly expressed to me the view that the U. S. Government had abandoned them and intended to deport them to Ja-

pan any way and that that explained the reason why the W.R.A. did not stop the activities of the pressure groups.

While I was in the Center I did not know and did not learn of one single citizen who renounced U. S. citizenship of his or her own free will or choice. I have not since then learned of a single person who renounced his or her U. S. citizenship by choice. A majority of those who did not renounce were those who least were subjected to the menace of the pressure groups because they were employed in the administrative section of the Center or lived in the blocks farthest away from the parts of camp where the pressure groups were most active.

In November, 1945, a large number of the alien leaders of the pressure groups were removed to Japan. After I left the Center in December, 1945, I learned that all the leaders of the pressure groups, their strong-arm gangs and active members who had engaged in their marching demonstrations had been repatriated to Japan by the end of February, 1946, including those leaders who had been removed from the Center and had been taken to other internment camps by the Justice Department in the spring of 1945. When I was released from the Tule Lake Center in December, 1945, the residents still exhibited fear of the leaders of the pressure groups who up to that time had not been repatriated to Japan. The terror in which the internees were held by those groups lessened after attorney Wayne Collins talked to a number of them about the end of July,

1945, and thereafter, especially after he had filed suit on behalf of approximately 1,000 of the persons who had renounced their citizenship because of it.

/s/ MASAMI SASAKI.

Subscribed and sworn to before me this 26th day of November, 1946.

[Seal] /s/ ALFRED D. MARTIN,

Notary Public in and for the City and County of San Francisco, State of California.

AFFIDAVIT OF ERNEST BESIG

State of California,
City and County of San Francisco—ss.

Ernest Besig, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of San Francisco, California; I am a member of the bar of the State of New York, and, since June 23, 1935, director of the American Civil Liberties Union of Northern California, an organization established to defend the civil liberties of all persons without distinction, with headquarters at 461 Market Street, San Francisco, California.

Ever since the exclusion and detention of persons of Japanese ancestry from the Pacific Coast in 1942, this affiant, as director of the Civil Liberties Union, has concerned himself with numerous civil liberties issues arising therefrom, and especially with problems at the Tule Lake Center, which was located in the area served by this Branch of the American

Civil Liberties Union. This affiant made four trips to the Tule Lake Center between July 11, 1944, and January 31, 1946, and ever since the inception of the camp until its closing he has had extensive correspondence with evacuees as well as with numerous employees and officials at that Center concerning civil liberties issues arising there.

On March 4, 1943, I received a wire from Harry Mayeda, a citizen confined to the Tule Lake Center, inquiring whether certain questionnaire forms should be executed by persons of Japanese ancestry, his wire reading as follows:

"Group here desire advise on whether selective service regulations are applicable to American citizens of Japanese ancestry in relocation center. Do you advise compliance with recent registration orders issued by the War Department and WRA. Appreciate immediate telegraphic reply care of Harry Mayeda, Community Council Tule Lake Project, WRA, Newell, Calif."

After conferring with my Executive Committee, I wired Mr. Mayeda as follows:

"It is our considered opinion that citizens of Japanese ancestry in centers are subject to Selective Service regulations, and, as a practical matter, we urge compliance with recent registration orders. We think the government's intentions were good but the method repetitious and otherwise poorly planned and executed."

In March, 1943, we protested verbally to the office of the War Relocation Authority in San Francisco,

California, and in writing to the War Relocation Office in Washington, D. C., against a compulsory registration of United States citizens of Japanese ancestry on Selective Service Form DSS-304A, entitled "Statement of United States Citizens of Japanese Ancestry" and the War Relocation Authority Application for Leave Clearance" Form WRA-126-Rev. because those written questionnaire forms required citizens of Japanese ancestry to admit, in answering Question No. 28 in each of said forms, that up to the time of executing such forms they had an allegiance which none of them had to Japan and required them then and there to renounce such allegiance and, in so doing, the government could construe that admission against them whether they answered it "yes" or "no" or failed to answer it. Citizens of Japanese ancestry were confined to the Tule Lake Center and other War Relocation Authority Centers at the time.

We also then and there complained and protested against a compulsory answer to said Question No. 28 in said forms which was required by the Army and the W.R.A. of resident nationals of Japan who, if compelled to answer "yes" to said Question No. 28, thereby took an oath of allegiance to the United States which, when taken by an alien, would transform that alien into a stateless person. Thereafter, the Government changed the form of the questionnaires for Japanese aliens so that instead of taking an oath of allegiance to the United States they were required to swear "to abide by the laws of the

United States and to take no action which would in any way interfere with the war efforts of the United States." However, citizens of Japanese ancestry were required to answer Question No. 28 in its original form.

Because of the fear in which citizens of Japanese ancestry just evacuated and then restrained of liberty in those centers, then had of answering such questionnaires which contained such an unfair question as Question No. 28 in excess of 5,000 such citizens in the various W.R.A. centers ultimately refused to answer the questionnaire. Hundreds of others, frightened, gave indiscriminate yes or no answers and many later reported that when they failed to give any answer the government representatives before whom the forms were filled out wrote in answers of yes or no to that question and other questions contained therein.

We also complained that the questions were poorly framed and ambiguous. According to a letter I received from D. S. Myer, the national director of the W.R.A., dated March 18, 1943, "... it was necessary to remove a total of 108 evacuees from the center, because of their refusal to comply with the W.R.A. regulation making registration compulsory, and in many instances because of efforts to persuade others not to register. One group was arrested and turned over to the local courts on charges of assault. Jail terms of two to six months were imposed in these cases."

I originally sought to visit the Tule Lake Center

to confer with evacuees during the week of June 12, 1944, but my application was turned down by Mr. R. R. Best, the project director, because, his letter states, "Due to the recent incident at Tule Lake—all visiting privileges have been restricted. . . . We anticipate that this present condition will continue possibly for the next thirty days." Following this letter from Mr. Best, more than 50 evacuees petitioned the W.R.A. for an opportunity to counsel with a representative of the A.C.L.U. concerning their legal rights. After further negotiations with the War Relocation Authority, I was reluctantly granted permission by Mr. Best to visit the Center with my secretary, Mrs. Philip Adams, on July 11, 1944, in order to confer with more than 50 evacuees concerning their detention. As soon as I arrived, accompanied by Mrs. Adams, I was besieged by scores of evacuees who wanted to register complaints with me. Mrs. Yukiko Mori was the first woman I interviewed. She complained amid her tears that her husband had been placed in the Stockade for eight months and that she and her three children had not been permitted to visit him; that she had requested and been denied permission to do so by the Internal Security staff, and that she had been turned away when she sought to appeal the matter to Mr. R. R. Best, the camp director. She said she had also asked the Internal Security office why her husband was detained, but the only answer she received was that it was a long story. After hearing the complaint, I immediately

prepared a written request by Mrs. Mori to visit her husband, which she signed, and I presented it to Mr. Best. Mr. Best declared he had no objection to having Mrs. Mori visit her husband but said she had never sought permission to do so. Mrs. Mori was permitted to see her husband at the Stockade that afternoon.

I had no sooner settled the Mori case, however, when another woman came to complain tearfully that her husband had also been incarcerated in the Stockade for eight months, and that she had likewise never been permitted to visit him. I again prepared a written request and presented it to Mr. Best. This time, however, he merely stated he would consider the request but would give no assurances that the woman would ever be allowed to visit her husband. In fact, Mrs. Mori proved to be the first relative who was permitted to visit the Stockade since its inception the previous November.

I had still other complainants tell me stories similar to Mrs. Mori's, and in each case when the matter was presented to Mr. Best he would agree merely to consider the written application to visit the prisoner. I told him of complaints I had received that prisoners in the Stockade had not been permitted to see children born after their incarceration, and that one young man had been denied visits from his fiancée, whom he was scheduled to marry the day after his arrest on November 13, 1943. Mr. Best acknowledged the truth of these charges, but declined to do any more than consider

individual applications with no promise that it would be favorable. I suggested that it was customary in all of our penal institutions to establish visiting regulations for relatives, and I urged that this should be done for the Stockade, but Mr. Best declined to do so.

Until these women came to me with their complaints, I had no knowledge that there was a Stockade at Tule Lake, nor that around 400 persons had been detained there for periods varying from one month to nine months without any charges being filed against them. Since the relatives of the prisoners not only sought visiting privileges but also my assistance in procuring the release of their men, I arranged with some difficulty to interview seven or eight of those whose relatives had specifically requested me to counsel with them.

The interviews were conducted with considerable difficulty. Although Mr. Best and the project attorney Mr. Irving Lechliter assured me that the men in the Stockade were not prisoners, I was permitted no privacy in interviewing them. A big insolent policeman was at our elbows when we began the interviews, and Mr. Best declined to remove him, stating that I could take it or leave it. Thereafter, however, the project attorney arranged to have the interviews conducted in a tiny room in the Stockade, with an officer stationed at each of the three doors leading into it. Consequently, there was no privacy. In fact, my secretary, Mrs. Adams, overheard a conversation on the telephone

in the adjoining room, as our conference proceeded, and told me that one of the officers declared that they were "taking it down" and that I had a woman in there who was taking it down in shorthand.

Two of the men in the Stockade whom I interviewed complained that when the police arrested them on November 4, 1943, they had been taken to the Administration Building and made to stand against the wall with their hands over their heads. They claimed that the Internal Security officers had sworn at them and had knocked them to the floor with baseball bats and that one boy had been taken to a latrine and beaten up by the officers. Later, I also interviewed and received the same stories from two boys who had been beaten up at the same time and who had been released from the Stockade after lengthy detention without any charges or hearings of any kind. These complaints of brutal beatings were confirmed by Anne Lefkowitz and Gloria Waldron, W.R.A. employees, who told me that when they went to work in the Administration Building the morning following the incident, they found a broken baseball bat and a mess of blood and black hair on the floors and spattered on the walls, which they were compelled to clean up before they could go about their duties.

The eight evacuees I interviewed in the Stockade were unanimous in declaring that at no time had they or anyone else previously held in the Stockade been charged with any offense or been granted any hearing whatsoever. Each stated he had sought

unsuccessfully to ascertain the grounds of his detention from Mr. Best, Mr. Schmidt, the police chief and Mr. Lechliter. They also told me that Mr. Edward J. Ennis of the Department of Justice had talked to them at the Stockade about the new law permitting them to renounce their citizenship during war time, but had advised them against renunciation, whereas Such representatives of the W.R.A. as Raymond Best, Assistant Director Harry L. Black, Project Attorney Irving Lechliter, and Messrs. Schmidt and Mahrt of the Internal Security Police had pressed such renunciations upon them while they were imprisoned in the Stockade. Indeed, in my conversations with each of those W.R.A. officials, each of them stated quite frankly that they had gotten rid of some alien Japanese by sending them to the Santa Fe, New Mexico, internment camp, and that they expected to solve their Stockade problem by getting the imprisoned men to renounce their citizenship and then send them on to Santa Fe for internment. In fact, in a lengthy complaint which I sent to the Hon. Harold Ickes, Secretary of the Interior, under date of July 14, 1944, I stated: "I know the administration is hopeful of solving its 'Stockade problem' by persuading the inmates to renounce their citizenship, thereby permitting their transfer to Santa Fe under Presidential warrants." Although I received a response from the Secretary, he never did answer the precise charges I made in my letter, but the men in the Stockade thereafter were allowed visitors and were released in about a month's time.

At the Center, I protested very strongly to Messrs. Best, Black, Lechliter and other members of the W.R.A. staff against any persons being imprisoned without due process of law, but the protests were received with indifference. It was only after conferences in San Francisco with the national director of the W.R.A., Dillon Meyer, Philip Glick, Solicitor, Ray Best, project director, Robert Cozzens, and Edgar Bernhardt, all of the W.R.A., and Wayne M. Collins, as attorney for the A.C.L.U., held on the eve of the filing of habeas corpus proceedings, that the Stockade prisoners were finally released the latter part of August, 1944.

As has been mentioned, some of the aliens imprisoned in the Stockade had been transferred to the Santa Fe Internment Camp, after being held for many months. The wives of such men complained tearfully to me that they and their families had not only been denied visiting privileges at the Stockade, but when these husbands and fathers were transferred to Santa Fe their families were not permitted to say goodbye to them. They begged me to do everything possible to permit them to rejoin their husbands. I sent written letters to the Justice Department and to the W.R.A., requesting that they also be transferred to unite their families and received the replies that they had no facilities available for families.

The W.R.A.'s cruel treatment of the evacuees is also exemplified by the erection of a beaver board wall on the side of the Stockade facing the colony

or main camp. This wall was erected to prevent the worried women and children of the prisoners' families from waving to them a hundred yards away. Before the wall had been erected, Internal Security officers had from time to time driven these people away, and on a number of occasions had shot over their heads to frighten them away.

On August 11, 1944, several of the wives of the Stockade prisoners, who were near hysteria from the prolonged concern over their husbands, tried to get permits to see them. When permits were denied, the women refused to go home, so Internal Security officers dispersed them by dumping water on them. A number of them and several W.R.A. Caucasian employees wrote me complaining of this mistreatment.

The Stockade prisoners complained to me that their mail was being censored, and, at the time I visited them, they had not received mail for ten days. Later, my own letters to them were held up. Mr. Lechlitter told me the W.R.A. had established the censorship and would continue the censorship. I complained to the project director, Mr. Best, without result. I also complained of this matter to the Postmaster General in Washington, D. C. by letter and received a letter reply from the First Assistant Postmaster General that all mail was delivered "to the authority of the War Relocation Center, and the censorship or handling of mail after delivery has been so effected is a matter over which the Post Office Department has no jurisdiction."

After spending two days at the Center interviewing evacuees, I was called to the office of Mr. R. R. Best, the project director, and informed by him that my presence at the camp was interfering with the investigation of the July 2nd Hitomi murder (which was wholly untrue), and even though I had not interviewed all of the people who had appointments with me, I would be compelled to leave at once. Consequently, Mrs. Adams and I packed up at once and departed under the escort and surveillance of two armed Internal Security officers who followed us in an automobile. As I stated in my letter of July 14, 1944, to Secretary Ickes, "It is rather difficult to understand why such a procedure was necessary, but then, from our observation, we have found that an arrogant display of force is the rule rather than the exception at the Center." We drove the 500 miles to San Francisco with great difficulty, discovering after our arrival that two sacks of salt, including the paper sacks, had been dumped into the gasoline tank of my car while it was parked in the administration section of the camp.

"I regret to say," said my complaining letter of July 14, 1944, to Secretary Harold Ickes, "that instead of being met with a spirit of cooperation when we came to Tule Lake, obstacles were constantly placed in our way to prevent our getting information. We even have evidence that an effort was made to keep us apart from the Caucasian personnel because we might question them.

"We appreciate, of course, that Tule Lake pre-

sents many difficult administrative problems. At the same time, I venture to say that the present policy of keeping the lid on can result only in further difficulties. I sincerely trust that some investigation will be made into what appear to me as intolerable conditions and practices.”

In discussions I had there with Mr. Best I was told by him that several thousand alien Japanese who wished to be repatriated to Japan had been brought into the Tule Lake Center with their families and were scattered in dwellings in the Center among thousands of citizens of Japanese ancestry and thousands of aliens who wanted and hoped to remain in the United States. He told me that the citizens and aliens who had long been in the Center did not want to be transferred to other camps away from the neighborhood of their former homes on the Pacific Coast. He told me that he knew of the dangers the situation presented and of the terrific pressure the aliens who desired to be repatriated to Japan were subjecting the citizens in the camp and also subjecting the aliens there who wished to remain in the United States. I told him that I thought such a dangerous situation ought to be corrected and that the aliens who desired to be repatriated to Japan should be segregated from the residents of the Center and be placed in separate quarters where they could not intermingle with the others. He said that the Government would not undertake what he called a “forced segregation” at the Center. He told me, in substance, that such a segregation would

be regarded as a confession of weakness on the part of the camp authorities' management of the Center and also that if the Government carried out such a segregation it would look as though the management had given in to the demands the aliens there who were seeking repatriation already had made for quartering them separately in the Center from the others.

From my own personal observations made in the Center and from talks I there had with members of the W.R.A. staff and employees and numbers of the internees, and also from correspondence I had with them, I learned that the Center then was ridden by countless fears of the internees as to what the Government had in store for them, fears that all of them would be detained and be deported, fear that, if relocated, their safety would be jeopardized by hostile communities, fear of the troops stationed in the Center, fear of the police there, fear of the aliens who were there to be repatriated to Japan and the desire of such aliens to Japanify the Center and fear of the gang warfare of which those alien groups were guilty. The W.R.A. administrative staff was itself riddled with and suffering from factionalism, intrigue and espionage. There was open criticism of the inept handling of affairs by responsible staff members who stated that the conditions under which the internees were living and the mismanagement of the camp could only bring dire consequences. A considerable number of the administrative personnel, as was pointed out to me

and as I observed, were Southerners who were outspoken in their contempt of the internees as members of a colored race, and the just complaints of a colored race, and the just complaints of evacuees against the manner in which the center was operated were augmented by the resentment and fear the race hatred exhibited by the civil servants invoked in them. A minority of the camp staff were friendly to the evacuees and sought to help them as much as possible, but their friendliness merely caused further dissatisfaction and strife because they were assailed as "Jap-lovers" by a majority of the administrative staff.

The isolated position of the Center and the difficulty in gaining access to it made it relatively easy for the camp authorities to carry out a policy of silence in connection with events occurring therein. The authorities there made a studied effort to keep stories of events from newspaper reporters, and staff members expressed to me their resentment for my having publicized and opposed the reign of terror at the Center. Mr. Robert Cozzens and other officers of the W.R.A. expressed this resentment to me.

While I was in the Center I expressed amazement to Mr. Best that Japanese language schools were allowed to be conducted in the Center. I told him that it was dangerous to allow those schools to exist and that it was wrong for the administration to stand by complacently while parents of children in the Center were being forced to send their children

to such schools where they were subject to being indoctrinated with Japanese sentiment. Mr. Best told me that the maintenance of those schools was justified because "the evacuees would be sent to Japan anyway so it was desirable to have them learn about Japanese culture."

After I returned to San Francisco, I received letters from Anne Lefkowitz, a W.R.A. employee at the Center, and from several internees complaining that Internal Security officers in the Center, in attempting to track down the Hitomi murderers, were giving the "third degree" to suspects picked up in the Center. The suspects were picked up without warrants of arrest and were questioned for hours on end before being released. Tetsunori Osedo, for example, wrote me that he was picked up by Internal Security officers twice, once on September 5, 1944, and again on September 12, 1944. On the first occasion he was held for five days without being brought before a magistrate. First he was questioned at the Stockade for about nine hours before being transferred to the county jail at Alturas, California, where he was questioned steadily without an opportunity for a rest besides being threatened with violence. On the second occasion he was again removed to Alturas without the benefit of a warrant and after being questioned in like fashion for about 12 hours was released and retaken to the Center.

On September 21, 1944, Internal Security officers, without the benefit of warrants, seized four high

school boys in the Center for questioning in connection with the Hitomi murder and released them later that day.

Mr. Edgar Bernhardt, a W.R.A. staff officer, admitted to me that these unlawful arrests were made by Internal Security officers at the Center.

The petty tyranny of the W.R.A. Internal Security officers is also exemplified by a written memorandum which Mrs. Masaye Nagashima received on June 26, 1944, from the Internal Security, signed by Fenton Mahrt, Senior Officer. It read: "On Tuesday, June 27, 1944 you and all members of your family will be called for and taken to the Police Station for interview. Kindly be prepared to leave when the officer calls for you at 1:30 p.m."

Many other women internees complained to me while I was in the Center, and many of them thereafter, by letters, that they had been terrorized by Internal Security officers coming to their homes and questioning them for long hours.

In July of 1945, the Civil Liberties Union intervened in the cases of five boys in the Center ranging in age from 15 to 17, who were charged with the violation of certain project regulations. They were tried by the Project Director, denied the right to bail, counsel, trial by jury and the right to subpoena witnesses. The Project Director sentenced them to serve terms in the Stockade ranging from 120 to 370 days. On August 10, 1945, petitions for writs of habeas corpus were filed on behalf of those boys in the U. S. District Court in San Francisco

and show cause orders issued thereon. The names of those boys are Thomas T. Imagawa, Haruo Tateyama, Shoso Takahashi, Shoso Yamasaki and Saige Okada, and those proceedings were numbered 5307, 5308, 5309, 5310 and 5311 in said court. Rather than litigate the matter and have the matter publicized the W.R.A. liberated each of the boys from the Stockade and, thereafter, on September 10, 1945, the proceedings were dismissed by the petitioners.

On August 10, 1945, I received an official written communication from Hon. Abe Fortas, the Under Secretary of the Interior, dated August 6, 1945, the date of my receipt thereof being stamped thereon by me. Said official communication was written by the Hon. Abe Fortas in his said official capacity as the head of the War Relocation Authority, under Secretary of the Interior Harold L. Ickes, to whose charge all the persons of Japanese ancestry detained in the Tule Lake Center had been committed by the President of the United States, in the performance of his official duties and concerning matters of which he had official knowledge. Said communication contains, in paragraph numbered "1" therein an official finding, judgment, declaration and report, made by him as such officer in the course and line of his official duties, and of matters of which he had official cognizance, that each and all of the renunciation applications executed by American citizens of Japanese ancestry in the Tule Lake Center during the winter then past were primarily due to pressures of the organizations therein men-

tioned. A photostat copy of said official letter is annexed hereto and incorporated herein and made a part of this affidavit for the recitals of fact it contains and the aforesaid official finding, judgment, declaration and report.

It was sometime during the middle part of January, 1946, when I again visited the Tule Lake Center that I discovered that a slave labor racket then was being carried on and had been continuously carried on since the inception of that Center. It then was and all during said period of time had been the practice of the Caucasian personnel to hire, for their own private purposes, internees who were hired in the capacities of nursemaids, cooks, domestics and cleaning women at concentration camp bargain prices of \$30 a month for a forty-hour week. Of this sum, the internees hired received \$19 and a \$3.75 clothing allowance and the balance of the \$30 was deposited in the treasury of the Recreation Club in the administration section of the Center which was operated only for the benefit of the Caucasian personnel. A Personnel Mess Hall served cheap meals only because such concentration camp labor was paid slave wages. Indeed, the waitresses received only \$16 a month for a forty-hour week. The Recreation Club had a barber shop where men's hair cuts could be secured for 40c at a time when the price in San Francisco was 85c for like service performed by free men. The barber received \$19 a month for his forty-hour week services. The beauty parlors operated by

internees for the benefit of the Caucasian personnel charged 75c for shampoos and \$4.50 for permanents but the operators received only \$16 per month for a 40-hour week. In the closing months of the Center internee operators were no longer available so Caucasian personnel were hired at the prevailing outside wages for regular operators. I am informed that auto repairing and car washing were handled by internees for the Center's Caucasian personnel at the same slave labor rates. In a sense, the Japanese were not required to take these jobs but if they didn't work they did not receive a clothing allowance. Those who worked received a personal clothing allowance of \$3.75 per month plus \$1.75 for each child.

Originally, all of the Japanese were hired through the Co-operative established by the Segregees, and they got the benefit of the few extra dollars above the monthly wages paid by a W.R.A. employer. When the Co-operative demanded that the employers increase their payments, the employment bureau was transferred to the Recreation Center operated for the benefit of the Caucasian personnel.

My second visit to the Tule Lake Center was made on July 30, 1944, when I was permitted to appear as counsel in certain proceedings before a leave clearance Appeal Board. On this occasion, I was also permitted to confer with persons who had previously made written requests to counsel with me, and who had been denied that opportunity at the time I was ejected from the Center on July 12, 1944. From my own observation and discussions

with the internees I talked to and members of the W.R.A. staff and personnel, I had knowledge that the internees in the Center were worried and in fear of what the Government intended to do with them, of acts of violence which had occurred in the camp, of their deportation, and of community hostility to them.

I again visited the Tule Lake Center in early January, 1946, and stayed on during the first few days while the so-called mitigation hearings were in progress and attended a number of those hearings as an observer. The evacuees were denied the right to counsel by the government examiners. All during my stay I saw, observed and found the evacuees to be in a state of terror. Members of the Hoshi Dan pressure groups were still in the camp and seeking to impose their will upon the evacuees generally. A large number of the internees, in excess of five hundred, told me that they had renounced American citizenship in 1945 involuntarily, because they were compelled to do so because of the great fear and terror in which they had been held by the pressure groups which had ordered them to renounce and threatened all the citizens in the Center that if they didn't they would be injured by their gangs and that when they were deported by the government to Japan they would be punished there for having refused to do so and for having opposed their movement and for being loyal to the United States. They said there had been no let up in the activities of the pressure groups until August, 1945, after the renunciation hearings were finished

and that everyone in the camp was in great fear of them until most of the pressure group leaders were repatriated from the camp to Japan in November, 1945, and that a large number were still in fear of the leaders of those groups who still were in camp but were soon to be repatriated to Japan.

I re-visited the Center in the latter part of January, 1946, and found the same conditions still existing, although the terror in which the pressure groups had held the whole camp had subsided considerably.

During my visits to the Center in January, 1946, I met and became acquainted with internees Frank Shimada, Kaoru Tsuneshige and Yukio Kataoka, each of whom long had been mentally incompetent, as was obvious from their physical appearance and talk. Each of these had executed renunciation applications at their renunciation hearings and the first two of them had received letters of approval of their renunciation from the office of the Attorney General.

I also learned later that a Mrs. Fudetani, an internee, sometime in February, 1946, because of her worries and fears arising from her detention, was committed by the Center authorities to a mental institution for hammering one of her children to death and injuring another. A Mr. Shamazu, an internee, worried over his separation from his sons, tried to commit suicide by drinking gasoline. A Mrs. Kato, an internee, took pills in an attempt at suicide because of her fear of being deported from the United States. Many mental cases were known

to have been hospitalized at the Center because of their fear of the pressure groups, continued detention, deportation, separation from their families and the splitting of their families. After renouncing in 1945 Mrs. Yoshiko Shinde, was found to have been a mental case, and was committed to the Stockton State Hospital by the camp authorities.

Unfortunately, the violence to which evacuees returning from our concentration camps were subjected in hostile civilian communities in this country was particularly bad in January, 1945. Appearing before the 51st annual convention of the Sheriffs of California, held in Sacramento on March 16, 1945, Robert W. Kenny, Attorney General of California, had the following to say about the violence which returning evacuees were meeting:

“On January 22 a group in Tulare County of Orosi ranchers and business men appeared and threatened the evacuee owners of a fruit and vegetable ranch with a deadline for them to leave. Why? Could it have had to do with a desire to prevent the returning Japanese-Americans from resuming their farming operations and putting their products on the market?

“On January 18, 1945, two civilian brothers and two brothers AWOL from the Army attempted to burn, and dynamite, and did some scare-shooting at Sumio Doi's ranch near Auburn. Why? The Doi family had a son in that Army unit which rescued the lost battalion of the 30th Infantry. Has that heroism been completely forgotten? Could it be that the Dois are good farmers. . . .

“Riders in the night poured shot into the homes of Sam Takeda near San Jose, Sam Uyeno near Orosi, John Shirokari at Lancaster. At Oakland, Kahuichi Sadamune who has three sons in the Army, was threatened by 'phone at 2:30 a.m. Are not these activities more reminiscent of Ku Klux Klans and Vigilantes than of our much-vaunted 1945 methods of protection of rights and maintenance of peace?”

Hundreds of cases of violence against returning evacuees occurred between January and August, 1945. In fact, the violence was not limited to the Pacific Coast, because when evacuees secured leave clearance from relocation centers before 1945, they were met with violence in numberless instances in the Western States.

/s/ ERNEST BESIG.

Subscribed and sworn to before me this 6th day of December, 1946.

[Seal] /s/ ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

AFFIDAVIT OF THOMAS W. GRUBBS

State of California

City and County of San Francisco—ss.

Thomas W. Grubbs being first duly sworn, deposes and says:

I am an adult citizen of the United States and of the State of California, residing therein at 1500

Post Street, San Francisco, and I am and at all times herein mentioned was a duly ordained minister of the gospel of the Christian faith and of the Presbyterian Church in the United States of America.

The religious work in the relocation and segregation centers was carried on under the auspices of the Protestant Church Commission, the co-ordinating agency for work with the Japanese of all the Protestant denominations in the United States. A representative of this agency, the Rev. Gordon K. Chapman, arranged with Mr. Best, for my service as a Christian minister to the English speaking young people in the Tule Lake Center. During this time I was employed by the Board of National Missions of the Presbyterian Church in the United States of America and this Board sent me as a minister of the gospel to Tule Lake, Modoc County, California, in June of 1944. I was permitted to work in the Tule Lake Center in the Union Church as a minister from about the middle of June, 1944, to about the first of February, 1946, by Mr. Ray Best, Project Director of the Tule Lake Center. He permitted me to work in the "colony," the inner internment area in that Center where the internees were confined and lived.

Approximately 18,000 men, women and children of Japanese ancestry, including citizens and aliens, were confined to that Center when I arrived. The Center was surrounded by a high steel wire fence which was topped with barbed wire. Soldiers pa-

trolled the fences and armed guards were stationed in the watch towers that surrounded the Center.

I worked in the inner area of the Center nearly every day during that period of time with the exception of an interval of approximately two and one-half months extending from late August, 1945, to early November, 1945, leaving each night when my work was finished. I conducted my religious services in a building that had been assigned by the W.R.A. for use as a church. I held Sunday services there, conducted Bible study groups and choir and performed general ministerial duties. For some time I engaged in making ministerial calls at the homes of internees but about the first of December, 1944, finally abandoned the practice because of the embarrassment such calls caused to the residents by reason of the peculiar conditions that reigned in the Center. The number of persons who attended my church varied from 50 to 75 persons each Sunday.

In the early part of July, 1944, one of the internees whose name was Yaozo Hitomi was murdered in the Center. The whole camp was alarmed by this crime which was reported in the Center newspaper. The person or persons responsible for the crime were not apprehended and the fact that a murderer or murderers were loose in the Center spread terror among the internees and many of them feared to leave their homes at night. At the time there was still much talked in the Center about the shooting of Jimmy Okamoto who had been shot by an M.P.

at the entrance gate to the Center which had engendered in the internees an outspoken fear of the possibility of troop violence against internees.

During the first few months I was in the Center I observed a number of Japanese language schools which were in operation there and how they flourished. A number of the teachers in those schools were alien Japanese, a number of whom I understood were to be repatriated to Japan of their own choice. The classes of which I obtained personal knowledge were conducted entirely in the Japanese tongue. The W.R.A. supplied these schools with light and coal. Barracks which could have been and ought to have been used for recreation purposes by the children of school age were delivered over by the W.R.A. for the conduct of these Japanese language schools. Had they been used for recreation purposes instead much of the trouble that happened in the Center would not have occurred and the story of renunciation would have been different.

On a number of occasions in October and November of 1944, I saw the pupils of various of these schools in semi-military formation, the tiny boys with heads shaven, the older boys with close-cropped hair following the fashion of students and soldiers in Japan, and the girls with braided hair in the fashion of school girls in Japan. Hundreds of children attended these schools where they were taught reverence for the Japanese Emperor and were indoctrinated in Japanese militarism.

A boy who was active in my church came to see

me one Sunday in late October, 1944. His hair was cut short. He said he had been compelled to have it cut short as a condition of attending the Japanese language school which was situated in Block 25 just across the road from my church. He said he was ashamed of having his hair cut like that. About a month later he came to see me again and said he had quit that school because of what the teacher taught the class. He said the teacher made the pupils bow in the classroom to where in a school in Japan a picture of the Japanese emperor would have been hung—that the teacher taught about the glory of Japan and praised the virtues of Japanese soldiers and militarism—that he was opposed to these things—that he was an American and that he quit the school because of these things.

That school was just across the road from my church. Two classes of pupils attended during the day, each class consisting of between 25 and 30 pupils. I frequently saw these children as they entered and left that school. The tiny boys had their heads shaven, the older boys their hair close-cropped and the girls had their hair braided in the Japanese style. They spoke in the Japanese tongue. During October and November of 1944 I frequently saw these children march around the school, engaging in exercises which were Japanese exercises. Often during that time I heard them singing foreign songs in their classrooms. A boy, Minoru Mochizuki, told me some of the songs they sang were Japanese war songs. A nisei member of my church

told me the pupils in that school were taught about the glories of the Japanese soldiers.

It was a matter of common knowledge in the Center among the internees and the Caucasian W.R.A. staff and employees that a number of the Japanese language schools were dedicated to a program of indoctrinating pupils with the ideals of Japanese militarism with the hope of weaning them from devotion to the United States to gain an attachment on their part to Japan. In the school across the road from my church and in a number of others the teachers forbade the pupils to speak in English, to participate in American dances and warned them against attending the American movies which were shown in the Center, the purpose being to convert them into Japanese and have them shun things American. A number of these schools were centers for the dissemination of pro-Japanese nationalistic propaganda. It was a matter of common knowledge that teachers experienced considerable difficulty in getting the children to speak Japanese and in their efforts to Japanize them and that the children did not enjoy attending the schools but were helpless to do anything about it. None of these schools were conducted under the supervision of Caucasians and none of them were interfered with by the W.R.A. I heard that the Hoshi Dan conducted a Japanese language school of its own.

From the time of my first arrival in the Center I sensed a strange atmosphere in the Center and a somewhat tense attitude of the internees and a re-

luctance to discuss their problems. They were not acting as normal persons act. At first many of my church members hesitated to confide in me. Upon repeated occasions during August and September of 1944 I was visited by officers of the Internal Security Police force and was interrogated by them as to when I preached, when I held meetings, what I preached, how many internees attended the services, whether any Caucasians attended and a history of my religious duties and practices. As a result of these interrogations it soon dawned upon me that either I was doing something wrongful or that something was radically wrong in the Center, and, consequently, I received the distinct impression that the Internal Security Police were interested in suppressing knowledge of something that the outside world knew nothing about and that they were fearful that I might make public what I observed went on in the inner area of the Center.

It is my recollection that sometime during the late summer or early fall of 1944 the Hoshi Dan and the Hokoku Seinen Dan were organized in the camp. I had no actual knowledge of these organizations until they commenced to march, drill and exercise in the inner area of the Center in November, 1944. These organizations had their headquarters in the inner area. These organizations long conducted a propaganda campaign to have citizens renounce and ask for removal to Japan. Their activities went far beyond a mere propaganda stage. They engaged in mass drilling and the wearing of

Japanese emblems. Their heads were close cropped or shaved. I first saw these groups marching in a body of 100 to 200 persons and drilling in formation sometime during November, 1944, in the inner area. The numbers of these marchers increased up to 500 and then 1000 or more persons by April, 1945, while the renunciation examinations were being held. They carried on those activities openly and kept the internees in a state of terror. During that period if an internee had any idea or desire of being relocated in this country he dared to talk about the matter only with those whom he knew he could trust and then only in very low tones because of intense fear of the pressure groups. A number of them talked to me in secrecy about these matters during that time.

It was a matter of common knowledge among the internees and the W.R.A. staff and personnel in the Center and a matter of almost daily discussion among them during the time that such pressure groups existing in the Center had coerced and were coercing men, women and children who were American citizens into renouncing and also aliens into asking the government to send them to Japan. I received frequent reports from members of my church that individuals had visited their homes to pressure them into renouncing citizenship and asking for removal to Japan. The coercion was direct, indirect and subtle. It was exerted in three general forms, (1) direct on them by threats of violence against them and their families and through intimi-

dation by mass marching, exercises and demonstrations, (2) through coercing parents to compel their children to attend Japanese language schools where the instructors used the classrooms to indoctrinate the pupils with Japanese propaganda and tried to Japanize them and (3) through coercion exerted on the parents to compel their children to renounce. During that time reports were rife of assaults and threats of violence by the pressure groups.

Very few aliens and citizens dared to leave the colony, that is, the inner area, to go to the administrative area to apply for leave clearance during that period because of the fear that if they did so that fact would be reported to the pressure groups and result in endangering themselves or their families. All internees over 12 years of age had been fingerprinted, photographed and were forced to carry identification badges. Internees were prohibited from leaving the inner area to enter the administrative section unless they first obtained a special permit from the internal security police. The turnstile gate opening from the inner area to the administrative section was closely guarded first by M.P.'s, later by the internal security police and finally by border patrols of the Immigration Service.

On repeated occasions in the late fall of 1944 I was verbally warned by the Army Chaplain who was attached to the detachment of troops in the Center not to go into the inner area of the Center at night because it might endanger my life or well-being. One afternoon a week during September.

October and November of 1944 the Reverend Shozo Hashimoto, a Japanese Christian minister, took me with him in making calls at various homes on internees in the Center. In December of 1944 he ceased doing this. I later learned from a nisei friend that he had stopped taking me with him because of his deep fear that a continuance of the practice might result in danger to himself, and his wife and daughter who lived with him in the inner area.

I was in the Center daily during the renunciation examination period. The pressure from the organizations on the community at large and parental pressure were so intense during the time that many young people had no alternative except to renounce and ask to be sent to Japan. For example, one young girl whom I knew, because of the fears that beset her, marched with the Joshi Dan girls in semi-militaristic formation and renounced but soon after a young Nisei soldier came to the Center to prevent her from being forced by her parents to go to Japan. Soon thereafter I had the pleasure of performing the ceremony that united the two in wedlock.

Almost as soon as their renunciation hearings were over a number of young people began to come to me in secret asking what could be done for them because they really had not wanted to renounce their citizenship. Their fears were so great that my talks with them were held with special caution. My discussions with them about writing to the Department of Justice about the matters were conducted

in secret because they feared lest any member of the pressure groups might overhear us and cause harm to them or their families if the matter became known or their parents learned about it. I wrote to the Department of Justice on behalf of many of these young nisei secretly and received replies from that Department in my own mail box lest the alien parents of these children or the pressure groups or a block manager should find out about the correspondence with the Department and the purpose of the correspondence and harm befall them as the result.

Only a person who was in the Center during the renunciation period and the period preceding it can begin to understand the terrible fear complexes which gripped the internees. The psychology of the internees that led to the renunciations was born of their mass evacuation, prolonged internment with no expectation of release, anticipated deportation to Japan, hostility which surrounded them outside the Center, the constant menace of the pressure groups inside the Center, the apathy of the W.R.A. toward their plight and its failure to afford them protection from the menace of the pressure groups. The resultant worries, distress and fears these things engendered in their minds drove them into despair and deprived them of all sense of reality and they did not and could not respond as normal beings. The psychological pressure brought upon the citizens to renounce and to ask to be sent to Japan was constant, terrific and intense. No one

who has not lived and worked with them behind the fences in a concentration camp where, with the exception of those attending the Christian Churches or the American school, they were practically separated from Caucasian friends and influence, and who did not observe the conditions under which they were compelled to live and suffer can feel, appreciate or realize the terrible fear they lived in and the then prevailing psychological currents that developed the terror in their minds that drove them into renunciations of citizenship.

/s/ THOMAS W. GRUBBS.

Subscribed and sworn to before me this 30th day of November, 1946.

[Seal] /s/ ALFRED D. MARTIN,

Notary Public in and for the City and County of San Francisco, State of California.

AFFIDAVIT OF ANN RAY

State of California,

City and County of San Francisco—ss.

Ann Ray, being first duly sworn, deposes and says: I am and at all times herein mentioned was an adult person, over the age of twenty-one years, a native born citizen of the United States of America, and a resident of the City and County of San Francisco, California, residing therein at 325 Arguello Boulevard.

From January 17, 1946, to January 26, 1946, I

visited the Tule Lake Center at Newell, Modoc County, California, where, with the permission of Mr. Ray Best, the Project Director of said Center, I was quartered in an apartment situated in the administration area. I went to the Tule Lake Center as an "observer" for the Northern California Branch of the American Civil Liberties Union and at the request of a number of persons of Japanese lineage who were confined to that Center and who requested me to appear as a friend at hearings which I was informed were hearings ordered by the Attorney General of the United States to be given and which were to be given them by government examiners. I never saw any such order or orders, however, and no written orders at any time whatever were shown or exhibited to me. The hearings which I attended at that Center were not called hearings on orders to show cause, however, but were called "mitigation-hearings" by the government examiners.

I attended twenty (20) complete hearings which were held in a building in the Center during the aforesaid period of time I was in the Center. I attended hearings held by the following government hearing officers, Messrs. Neelly, Pennington, Doser, Murff, Sahli, Barber, Noreve and Mulle and Miss Ollie Collins. A few of those hearings lasted only ten minutes and the others ranged up to two hours. While there I saw hundreds of renunciants waiting in the corridor of the building and in its waiting rooms where they were awaiting like hearings.

Without exception all those whom I there saw appeared grave and in fear. Many were trembling and all appeared serious and highly nervous. Many girls and mothers cried. Each exhibited in face, speech and action the characteristic symptoms of worry, distress and fear. Each of the persons whose examination I attended told me, just before being called into the examining room, that he or she was nervous and in fear and I saw that each therein was nervous and trembling. Many were incoherent. All appeared intimidated.

During that time I spoke to a number of the government examiners who had been assigned to conduct said hearings. Mr. Charles Rothstein and Mr. Neelly, government examiners, on January 18, 1946, at said building told me that none of the renunciants was allowed to have an attorney represent him or her at the examinations or to be advised by an attorney or to have any legal advice whatever. I was then and there told by each of them that I could not ask any questions of any renunciant or any witness at the hearings. Both of them told me that I could not take any notes and wouldn't be allowed to make any notes of the hearings. Consequently, I did not make any notes in the hearing rooms. However, I made notes of each of the hearings I thereafter attended. I made those notes in pencil in my notebook immediately following each hearing I attended. That notebook with the notes I wrote therein I kept and still have in my possession.

None of the renunciants whose examination I

attended was represented by an attorney and none of them was advised by an attorney and none of them had any legal advice or any independent advice about the hearings. I neither saw nor heard of any witness from the outside world being called or appearing on behalf of any renunciant. There was no procedure or time allowed any of them to obtain outside witnesses. There were a few American soldiers of Japanese ancestry on leave from foreign battlefields visiting their families in the Center and I was informed that during their visit they appeared on behalf of renunciants in their families.

Many of the renunciants and members of their families who appeared as witnesses for them were incoherent in their speech because of anxiety and fear and could not adequately express themselves in answering questions put by the examiners. All of those whom I there saw during the examinations looked worried, depressed and in fear and all of those whose examinations I attended told me just before entering the examining room that they were worried and scared.

On January 18, 1946, at 9 a.m., at their requests I accompanied Sam Bozono and his sister, Fumiko Bozono, renunciants, to Room G in that building, to attend their hearings as a friend. In that room Mr. Neelly, the government examiner before whom the two were to appear for their hearings, addressed me and said, in substance, "You are an observer for the Civil Liberties Union. You cannot attend

a hearing. I ask you to leave the room." I told him I was asked to attend simply as a friend of Mr. and Miss Bozono, who were frightened. He said "It makes no difference. You will have to leave the room." I left. I went to see Mr. Rothstein and told him what had occurred. He said, in substance, to me, "Well, it doesn't make any difference. The hearings are just routine procedure. Everything is decided in advance. Certain arbitrary factors determine a right to release. The testimony of the examined and their witnesses doesn't make any difference." He said he would tell each examiner to admit me and also Miss Catherine Porter at hearings.

After my talk with Mr. Rothstein I later was admitted to other hearings held by Mr. Neelly, who told me, however, at the next one I attended before him that I could not take any notes of what went on at the hearing. Nevertheless, I made notes of that hearing and of each hearing I attended just as soon as I left the examining room and entered the corridor at the conclusion of each such hearing. I made my notes in pencil in my notebook which still is in my possession.

On January 22, 1946, Mr. Masaharu Mario Nakano, a young man who was a renunciant who had a wife and two dependents, asked me to appear with him at his hearing scheduled for that morning because, as he said, he was scared and afraid to go alone. Hearing officer Mr. Field in Room D of that building excluded me from his hearing. I

saw Mr. Nakano when he came out of the examining room about 20 minutes later with Mr. Rothstein and Mr. Field. I said to Mr. Rothstein, "Mr. Nakano was absolutely frightened." I then turned to Mr. Nakano and asked in their presence if he hadn't asked me to appear as a friend at his hearing and he said, "Yes, but I was afraid to tell Mr. Field because I felt he didn't want you there."

The government examiners had dossiers in their possession in the case of each person who was examined. The examiners looked through and scrutinized papers in those dossiers in my presence during each examination and questioned them from matters contained therein during the course of those hearings but they did not exhibit or allow any of the renunciants or witnesses to look at the files or any document contained in them. They cross-examined the renunciants about things and matters contained in those dossiers.

At none of the hearings I attended did I hear any examiner tell a renunciant, in substance or effect, that he or she was an alien enemy or was deemed to be an alien enemy or was considered to be an alien enemy or that if he or she was unsuccessful in the examination he or she would be removed or be ordered removed to Japan. A number of the examiners, however, did tell the renunciants examined in my presence that if he or she was successful at the examination he or she would be recommended for a release from detention.

One morning during my stay in the Center one case was directed to my attention where an examining officer was the same one who had given a renunciant his renunciation hearing months before. The same day I called the matter to the attention of Mr. Rothstein and asked him whether or not some of the renunciants were being given hearings by the same officers who had given them their renunciation hearings and whether such a procedure was proper or authorized. He said to me, in substance, "It doesn't make any difference, the hearings don't amount to anything—it's all right—the way the hearings are conducted is immaterial—release depends upon arbitrary factors and not upon the hearing."

One evening while I was in the Center I was invited to visit the home of the Opler family which was situated in the administration section of the Center. I accepted and visited Dr. and Mrs. Marvin Opler in their home. Dr. Opler was the "Community Analyst" for the W.R.A. While there Dr. Opler told me that for a long period of time he had been conducting "rumor" experiments in the camp.

I attended a few hearings conducted by government examiner, Miss Ollie Collins, who was kindly, pleasant and tried to allay the fears of the renunciants who appeared before her for their examinations. I attended her examination of Mr. Frank Shimada who had renounced. I observed that Mr. Shimada was practically blind in both eyes and that one of his hands was maimed. His mentality

was seriously impaired. These conditions were the result of injuries I learned he had suffered when he was a child about six years of age as a result of an explosion. His speech was labored and difficult and he did not appear to grasp either the nature or purpose of his examination and all his answers to questions put to him by Miss Collins, as I recall, were "Yes." Miss Collins amplified his answers and restated them to her secretary who took them down in shorthand. He was mentally deficient and his whole physical appearance, facial expression and answers clearly displayed a defective mentality. His renunciation had been approved months previous. It would have been impossible for him to have had the slightest idea of what had gone on at his renunciation hearing. I was informed that he was unable to read or write English or Japanese, but that he could write his name in English. Miss Collins called Mr. Shevlin into the room to show him that a renunciation had been accepted from a person in his physical and mental condition.

While I was in the Center I talked to approximately 200 renunciants. Each of these men, women and children told me that he or she and all the renunciants had renounced because of a combination of reasons which prevented them from doing otherwise. Each said that at the time of the renunciations he and all the internees in the Center long had believed and feared and then believed and feared that the Government was going to deport all of the

citizens and aliens to Japan and that the Government had announced they would be sent there on an exchange ship. Each said that because of the hostility to persons of their ancestry that was reported to them existed and then did exist in civilian communities outside the Center they believed and feared that if the Government forcibly relocated them that they and their families would have been attacked, killed or seriously injured by hoodlums simply because they were of Japanese ancestry and that they then had believed and feared, as a matter of fact, that the Government was going to deport them anyway and that it wanted them first to renounce; that he and all the internees then and for a long period of time before then lived in great fear of the pressure groups which had developed from the ranks of the aliens seeking repatriation to Japan who had been brought into the Center in 1943 and had not there been isolated from the rest of the internees; that they had been especially in fear of the Hoshi Dan leaders and mobsters who had intimidated them for a long period of time commencing in the autumn of 1944 and had been guilty of disseminating disloyal and subversive propaganda in the Center and had made many threats against the internees who opposed them and their movement and had committed many acts of violence against internees who opposed them and failed to obey their threats and orders.

Each told me that he and all the internees then

long had been intimidated, threatened and told by Hoshi Dan members that they had to renounce and ask to be sent to Japan and that if they didn't do so they would be punished by them and that, because the Government was going to deport all the internees anyway, that they had to renounce and ask to be sent to Japan "to save their skins when they got to Japan" because if they didn't the Hoshi Dan leaders would report them to Japanese authorities for having disobeyed their orders and opposed their movement and for being American spies and that in Japan they would be punished as American spies. Each of them told me that he and all the internees then had believed these threats would be carried out and that they were in great fear because of these beliefs and were compelled to renounce for these reasons.

Each told me that he and all the internees in the Center had not dared to tell the government hearing officers at the renunciation hearings the real reasons why they signed renunciation applications because they then had not dared to tell them because of the fears and terror then existing in their minds. Each told me that he did not dare to tell them of the terror in which the pressure groups then existing in the Center had held him because of his belief and fear that if he did so those threats would be carried out and his life and the lives of members of his family would be endangered. Each said the Hoshi Dan leaders and gangsters intimidated them into telling and trying to convince the renunciation hearing officers that their renunciations were voluntary and that no one had coerced or tried to coerce them into

renouncing and that they were compelled to obey because if they had not done so they believed they would have been harmed or injured by those groups.

They told me that the renunciation examiners had seen the Hoshi Dan marching demonstrations while they were in the Center to conduct the hearings and knew all about the terror and that they believed the examiners wouldn't pay any attention to statements about their fear of the organizations and that if they said anything to the examiners about their renunciations having been coerced the gangs would learn about it and injure them and their families.

Each of them said that because no one had been allowed to attend their renunciation hearings and because each one was examined separately by a government hearing officer they had been more frightened than if they had been allowed to have someone present with them. Each said he did not have any legal advice from any person and that he was not represented by an attorney at his renunciation hearing and that he had not had any independent advice at that hearing or any chance to obtain such advice because of his internment, except the threats of the pressure group members that he would be harmed if he didn't renounce and that he must renounce to save his skin. Each said that all the renunciation hearings were extremely abrupt and short and that he and all renunciants were in fear of the examiners.

Each told me that he and all the internees were in great fear of the Hoshi Dan leaders until sometime in November, 1945, when a majority of those

leaders and hoodlums were repatriated to Japan and that when the last of them were scheduled to be removed about February 23, 1946, they would not have to be in fear of them any longer. I asked many of them if they knew of a single case where anyone had renounced voluntarily and they said, no, that would have been impossible because everyone was terrorized by the pressure groups and that the fear of them and what the government intended to do to them prevented anyone from doing otherwise.

I learned that when Mr. Burling of the Justice Department was in the Center he had written a letter to the Hoshi Dan and Seinen Dan leaders warning them to stop their propaganda and acts of intimidation against the internees but that the activities of those groups grew worse instead of better afterward and until all the renunciation examinations had been finished.

A number of the young boys and girls told me that their alien parents were so in fear of the pressure groups and dominated by them that they had urged their children to renounce and that some of them had urged their children to join the pressure groups for security reasons, that is, to save themselves and their children from harm. All those to whom I spoke about the renunciations stated that at the time the Hoshi Dan had spies everywhere in camp and that anything said against its leaders or movement would bring danger upon the informers and that many internees who had informed against them or who were suspected by them of having

informed against them had been beaten up in the camp and that all the internees had been too alive to the danger to do anything about it and because the W.R.A. which knew all along what had been going on did not protect them against the danger. A number of them told me that the Hoshi Dan leaders had threatened the whole camp and ordered the internees to speak Japanese and not to speak English and not to talk to Caucasians in the Center and that they and the whole camp believed that they would be harmed if they disobeyed those threats and that very few persons dared to speak to Caucasian employees in the Center for fear they would be deemed by the pressure groups to be informers and be injured as the result. All of them stated that troop violence against the internees, the shooting of Jimmy Okamoto, the police violence, the murder of Mr. Hitomi and the failure of the authorities to arrest the murderer who was loose in the camp, the arrest and incarceration of hundreds of innocent internees in the stockade, the assaults, beatings and threats made by gangsters and the failure of the W.R.A. to protect them against the pressure group terrorists all combined to fill the whole camp with fear and to convince them and make them fear the Government looked upon them as mere Japs and didn't care what became of them except that it wanted them to renounce before they were deported to Japan and that they believed the government hearing officers knew all about the terror that existed in the Center and didn't care to be told about it and that the only way they could gain

relief from this mistreatment was by obeying the orders of the Hoshi Dan leaders and renouncing and that, by so doing, they hoped to remain in the Center secure from outside hostility and from the hostility of the pressure groups until the war was over.

Miss Catherine Porter of 3234 Pacific Avenue, San Francisco, California, accompanied me to the Tule Lake Center and appeared at a number of hearings as an observer and friend of a number of the renunciants. Since then she has married and her name is now Mrs. Catherine Short. One evening while we were there she and I went for coffee to the Recreation Club which was situated in the Administration section of the Center and which was reserved for the exclusive use of Caucasians who were waited upon and served by internees who were specially licensed by the W.R.A. to work there at the low pay rates authorized by the W.R.A. We sat down at one of the tables and while seated there one of the uniformed members of the Caucasian internal security police force came over to our table and introduced himself. I do not recall his name. In the course of his conversation he said, "If there is anything I hate it is a Jap. All Japs should be taken out and shot." We looked at him and he said, "Oh! I see, I'm at the wrong table," and thereupon left. The gruff method, the harsh tones and the sarcastic statements made by a majority of the government examiners at the hearings in their questioning of renunciants clearly indicated that they, too, looked upon the internees as mere "Japs."

Many of the young men to whom I talked told me

that before their evacuation and also when they were placed in camp that they had volunteered for military service but that their services had been refused and that they had been classified 4-C and thereby were wrongfully branded as alien enemies by the Government. Many told me that when they had been forced to answer questionnaires by the Army and the W.R.A. while held in camp that they were afraid to answer Question No. 28 negatively or affirmatively because they feared whatever answer was given would have been considered by the Government to be an admission that up to that time they had an allegiance to Japan which was false and that they thought it was a trap the Government wished them to fall into so that it could hold them in detention and deport them. Many of them told me that the Hoshi Dan gangs had compelled them to attend coaching courses it gave to make them give stereotyped false answers to questions at their renunciation hearings to make sure their renunciations would be accepted and that, under that compulsion, they had done so and that they did not dare to disobey the orders of those gangs for fear disobedience would endanger their lives and the safety of their families in the Center; many told me that they had not dared to tell the examiners at the time of their renunciation hearings that they did not wish to renounce or to tell them that they were compelled to renounce because the gangs would learn about and punish them.

A number of parents of renunciants told me that

their children attended the W.R.A. sponsored Japanese language schools in the Center where they had been pressured into sending their children by the pressure groups leaders and because they had no choice of other schools. A number of the children told me that they had attended these schools because they, too, feared that their parents' safety and their own safety would have been involved if they had not done so. Many of the parents told me that the W.R.A. policy of establishing and maintaining those schools in the Center led them and all the internees to believe the Government wished the school children to be transformed from Americans into Japanese so that they would be prepared for their future life in Japan when the Government deported them and their parents to Japan.

While I was in the Center I talked to Mr. Lou Noyes, the W.R.A. Project Attorney, and to Dr. Marvin Opler, the W.R.A. Community Analyst. Both told me that the mass renunciations were the products of coercion by the pressure groups.

While I was in the Tule Lake Center I made many inquiries of internees to ascertain if any of them knew of a single case where anyone had renounced his or her American citizenship voluntarily but neither heard of nor learned of a single voluntary case of renunciation. All were involuntary and caused by their detention, mistreatment and the fear and terror in which they were held

by the Government and the pressure groups that were allowed to operate in that Center. While there I learned that the Government had accepted and approved the renunciations of a number of internees who were insane, of a number who were mental incompetents, and of a large number of boys and girls under twenty-one years of age. I also learned from first-hand knowledge while I was in that Center and while the renunciants were still held in internment by the Government that all of the renunciations had been accepted by the Government while the internees were laboring under and were terrorized by the mob rule that had raged in that camp.

/s/ ANN RAY.

Subscribed and sworn to before me this 4th day of December, 1946.

[Seal] /s/ ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

Service and receipt of copy of foregoing admitted
December 11, 1946.

FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Defendants.

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO AFFIDAVITS OF MERIT FILED BY DEFENDANTS AND MOTION TO STRIKE THE SAME

On November 12, 1946, the defendants filed herein the affidavits of John L. Burling, Charles M. Rothstein, Ollie Collins, Joseph J. Shevlin, Lillian C. Scott and Thomas M. Cooley II, including Exhibit A attached to the latter, said affidavits purporting to be affidavits of merit in opposition to plaintiffs' Motion for Summary Judgment and plaintiffs' Motion for Judgment on the Pleadings filed herein on October 14, 1946, and plaintiffs' Motion to Strike filed herein on October 10, 1946, and also purporting to be affidavits in support of defendants' cross-motion for summary judgment; and on December 5, 1946, defendants filed herein in opposition to plaintiffs' said motions for summary judgment, for judgment on the pleadings and to strike and in support of defendants' cross motion for summary judgment the affidavit of Thomas M. Cooley II to which is attached Exhibits A, B and C and miscellaneous memoranda:

The plaintiffs and each of them hereby objects and excepts to the introduction in evidence herein of each phrase, clause, sentence and paragraph of each of defendants' said affidavits of merits, including the exhibits attached thereto, and to the whole of each of said affidavits and exhibits and

objects and excepts to any consideration whatever being given thereto by the court on the pending motions and moves to strike the same for each and all of the following reasons and upon each and all of the following grounds, to-wit:

(Specific Objections)

The same is and are:—

1. Opinions and conclusions of the affiant;
2. Hearsay;
3. A self-serving declaration;
4. Not part of the *res gestae*;
5. Not in issue herein;
6. Has no bearing on any issue herein;
7. Too remote to have any bearing on any issue herein;
8. Not the best evidence;
9. Is secondary evidence for the introduction of which no foundation has been laid;
10. Assumes something not in evidence;
11. Not binding on any petitioner herein;
12. Negative pregnant;
13. In conflict with admitted facts;
14. In conflict with facts of public notoriety of the truth of which the court has and takes judicial cognizance;
15. In conflict with the contents of pertinent public records; written instruments and official documents;
16. Attempts to alter or vary the terms of pertinent written instruments, public writing and official communications;

17. Not assertable by affiant who is estopped to assert the same because it is in conflict with facts admitted by the pleadings and with facts of public notoriety, and contrary to pertinent public writings and records and official communications and is an attempt to alter or vary the term of those writings, records and communications by parole evidence and such are not impeachable by affiant;

18. Not matter observed or heard by affiant and not matter within his personal knowledge;

19. Sham;

20. Evasive;

21. Conjectural;

22. Vague;

23. Indefinite;

24. Uncertain;

25. Ambiguous;

26. Irrelevant;

27. Redundant;

28. Immaterial;

29. Affiant is not qualified to testify as an expert witness on the matter therein contained or to offer an affidavit herein on said matter;

30. No foundation has been laid for affiant to testify as an expert witness on the matter contained in his affidavit;

(General Objection)

And that the same is incompetent, irrelevant and immaterial;

(Special Objections to Special Exhibits)

In addition thereto each plaintiff objects and

excepts to the introduction in evidence herein and moves to strike each and every word, phrase, clause, sentence, paragraph and page of Exhibit A attached to the affidavit of Thomas M. Cooley II filed herein on November 12, 1946, purporting to be a memorandum of the Japanese Nationality Law as translated by one, Kenzo Takayanagai, and Exhibit B attached thereto and purporting to be a translation of sections of the Nippon Horei Zensho and the Genko Horei Shuran and also each and every word, phrase, clause, sentence, paragraph and page of Exhibit A attached to the affidavit of Thomas M. Cooley II filed herein on December 5, 1946, and purporting to be the affidavit of one, Thomas L. Blakemore, and Exhibit B attached thereto and purporting to be a memorandum prepared by said Thomas L. Blakemore, and Exhibit C attached thereto and purporting to be a deposition of said Thomas L. Blakemore taken in a proceeding in the District Court of the United States for the Southern District of California, Northern Division, in a matter entitled "In the Matter of the Petition of Fumiko Tamura for a Writ of Habeas Corpus," No. 376-Civil therein, and miscellaneous photostat copies of a printed publication in the Japanese language attached thereto and Exhibit D attached thereto, and the whole of each of said affidavits and exhibits on each and all of the aforesaid reasons and grounds and upon the following additional and special grounds, to wit:—

The same is and are:

a. Opinion and conclusion of such affiant;

- b. Hearsay of such affiant;
- c. Sham;
- d. Evasive;
- e. Conjectural;
- f. Vague;
- g. Indefinite;
- h. Uncertain;
- i. Ambiguous;
- j. Incompetent;
- k. Irrelevant;
- l. Immaterial;
- m. Self-serving;
- n. Unintelligible;
- o. No foundation has been laid for the introduction of the same into evidence;
- p. Said such affiant is not qualified as an expert either in ability or proficiency to translate from the Japanese language into English;
- q. Said such affiant is not qualified as an expert to testify as to the law or any law of Japan and in particular to the nationality laws of Japan, past or present;
- r. Said document and the declarations and purported translations from Japanese to English therein are self-serving;
- s. The Japanese law, including the Japanese nationality laws, are not in issue herein and have no application to any issue herein;
- t. The law of Japan has no extraterritorial effect and cannot in anywise affect any citizen of the

United States or any person residing within the United States;

u. The nationality law of Japan has no extraterritorial jurisdiction or effect over any citizen of the United States or resident of the United States;

v. The nationality law of Japan has no application whatever to any citizen of the United States or to any resident of the United States;

w. The said exhibits pertaining to purported laws of Japan are barred by the provisions of Title 8 USCA, sec. 800, and are inadmissible in evidence;

x. The said exhibits pertaining to purported laws of Japan are inconsistent with the grant of citizenship by the 14th Amendment and are contrary to the due process clause of the 5th Amendment and to the sovereignty of the United States and are barred from being introduced into evidence by reason thereof.

(General Objection)

And the same is and are incompetent, irrelevant and immaterial.

The above and foregoing special and general objections to the introduction of said affidavits and their contents in evidence on the pending motions herein and motions to strike the same are hereby submitted.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

Receipt of a copy of the above Objections and Exceptions to Affidavits of Merit is hereby admitted

this 18th day of December, 1946, for submission to the court on the pending motions for judgment on the pleadings, for summary judgment and to strike and cross-motion for summary judgment.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 18, 1946.

AFFIDAVIT OF ROSALIE HANKEY

Chicago, Illinois,
Cook County—ss.

Rosalie Hankey, being sworn, deposes and says as follows:

I am a graduate student of anthropology and am presently employed by the Department of Anthropology in the University of Chicago as Assistant in Anthropology. In July of 1943 I entered the employ of the Evacuation and Resettlement Study of the University of California at Berkeley, California. At this time I was 31 years old.

This Study was an organization especially set up by the University of California with funds donated by the Giannini and Rockefeller Foundations

to observe and record from the sociological standpoint the evacuation of persons of Japanese ancestry from the Pacific Coast ordered by Lieutenant General John L. DeWitt and the social phenomena which resulted therefrom. This Study was under the direction of Dr. Dorothy S. Thomas, a professor at the University of California. The Study employed a number of students of sociology and anthropology who acted as observers in the several assembly centers and relocation centers and also employed students of Japanese ancestry, who themselves were evacuated, to act as reporters. I was at first assigned by Dr. Thomas to the Gila Relocation Center and began my work there in July of 1943. The nature of my duties there included the recording of events and evacuee attitudes, and the preparation of reports describing and analysing the sociological phenomena. On February 1, 1944, after seven months of almost continuous residence at the Gila Center, I was directed by Dr. Thomas to visit the Tule Lake Center in Modoc, California, to make a preliminary survey of the attitudes of the segregated evacuees. Approximately three weeks before this visit, the jurisdiction of the Tule Lake Center had been returned to the War Relocation Authority by the Military. At this visit I remained at the Tule Lake Center for two days. I made two succeeding visits to the Tule Lake Center: from March 14 to March 23, 1944, and from April 12 to April 17, 1944. Between these visits I returned to the Gila Center. On May 13 of 1944 I

took up permanent study in the Tule Lake Center and remained there until May 9, 1945, except for three brief trips to consult with Dr. Thomas. Therefore, I observed substantially all of the sociological developments leading up to the renunciation of citizenship and was at the Tule Lake Center during most of the renunciations themselves.

During all of this time, by the techniques described below, I assembled very full field notes on the renunciation program and submitted these to the Evacuation and Resettlement Study. I also submitted voluminous reports on evacuee attitudes toward renunciation. The University of California has recently published the first volume of its studies, which volume relates specifically to those evacuees who renounced their citizenship. The book was put into final form by Dr. Dorothy S. Thomas and Richard Nishimoto, who was the Study's observer in the Colorado River Relocation Center. To the best of my knowledge and belief, insofar as it deals with events taking place at the Tule Lake Center after segregation, this book is based entirely on my field notes and the manuscripts which I submitted, except for certain information gained after the renunciation program had been completed from talks with evacuees who were there at the time and from letters written by evacuees after the renunciation program was complete.

For the above reasons and because of the techniques employed by me, hereinafter described, it is my belief that I am qualified to speak as an expert

on the social pressures obtaining within the Tule Lake Center prior to and during the renunciation program from December, 1944, through May, 1945.

I obtained information for my field notes in the following manner:

The accumulation of data on evacuee attitudes presented many difficulties to a person of Caucasian ancestry. The experiences of evacuation and the confining life of the Centers had intensified the pre-evacuation in-group solidarity of the Japanese residents. The WRA administration and its staff members, the visible representatives of authority, were commonly held responsible by the evacuees for the great variety of inconveniences, annoyances, and hardships of Center life. Therefore, the WRA staff, in general was regarded with considerable antipathy. The strong in-group sentiments of the Japanese and their dislike of the WRA administration were, in part, responsible for an additional phenomenon which increased the difficulties of sociological investigation. This was an extraordinarily powerful evacuee fear of being considered a stool-pigeon. This fear was coupled with a hatred of persons alleged to be stool-pigeons, i.e., traitors to their own people. Such persons were called *inu*, a Japanese word meaning dog or informer. Any evacuee who appeared to be on markedly friendly terms with a Caucasian staff member or was observed visiting the Administration buildings when he had no specific business there exposed himself to being called an *inu*.

The inu phenomenon was a potent means of social control in all of the Centers of which I have knowledge. In Tule Lake it played a very significant part in the sociological developments which preceded the renunciation of citizenship. It was largely responsible for the fact that terrorists and persons guilty of violent assault were not denounced to the authorities. To be stigmatized as an inu brought social ostracism which in the crowded and confined life of the Centers was painful in the extreme. All meals were served in public mess-halls. An alleged inu, seating himself at a table, was greeted with an uncomfortable silence and meaningful glances. If he entered a latrine or boiler room, which were common places for gossip and discussion, he found that friendly talk or argument stopped with his appearance. Because of the lack of privacy which Center conditions imposed, he could find no escape and was reminded of his despised position many times every day. During a period of tension, he might be assaulted and severely beaten. In the Tule Lake Center at least seven men alleged to be inu were beaten. In the same Center, Mr. Hitomi, alleged to be an inu, was murdered. If, therefore, an evacuee or a segregee held opinions contrary to those which were considered the prevailing sentiment, he was strongly inclined to keep these opinions to himself or to voice them only to trusted intimates. He was also inclined to avoid the appearance of intimacy with WRA staff members.

I was able to substantially overcome the handi-

caps to sociological investigation outlined above in the following manner. To my informants I stressed the fact that I was not a member of the WRA administration but a student, hired by scholars who were interested in preparing an accurate account of events within the Japanese Centers. I stated that I would not show my data to the WRA administration and would not reveal the names of my informants. These contentions were not believed until my informants had the opportunity to observe that I had little association with WRA staff members and that I did not attempt to pry into those matters which evacuees were reluctant to discuss with a Caucasian. In the Gila Relocation Center I began my field work by initiating a series of innocuous investigations, e.g., how Center life was affecting the children. This and similar projects gave me the opportunity to make frequent visits to the apartments of evacuees. After this program had been continued for several months, certain informants made overtures of friendship. They then began to give me an informal education on the genuine attitudes of the residents which often differed greatly from the stereotyped attitudes generally reserved for Caucasians. I gained intimate knowledge of those matters which a member of the in-group was morally obliged not to reveal to outsiders. When certain of these friendly informants began to give me a considerable amount of their time, I offered to pay them. This offer was refused. The situation which resulted put me under an

ethical obligation. I was obtaining information through friendship and I had no means of recompensing informants except by rigorously observing the taboos of the in-group, i.e., keeping my promise that I would reveal no information given to me. This process was cumulative and, in time, I was given information of an extraordinary nature. In Tule Lake a self-avowed ardently pro-Japanese group determined to circulate one of their petitions without asking permission of the WRA administration. They feared that they would be denied permission, since a few weeks before, the WRA had emphatically informed them that it did not intend to embark on the program they sponsored. One of the most influential leaders of the group sponsoring the petition, allowed me to read it several days before it was circulated and described the pressure his group intended to apply to residents who did not wish to sign. In Tule Lake evacuee informants also gave me the name of the man who was alleged to control a gang of terrorists. This gang, I was told, had committed a series of assaults upon the so-called innu (stool-pigeons). These informants did not give this information to the WRA administration or, so far as I know, to the police. Moreover, a Japanese informant who was severely beaten, assured me that the aforementioned gang of terrorists was responsible for the assault. Previously, he had refused to name his assailants to the WRA Internal Security. I did not reveal this, and much other information of similar character, to the au-

thorities. Because of this policy I was able to obtain data which, I believe, far exceeds in accuracy and reliability the information gained by most Caucasians who were in contact with the Japanese in the Centers.

I was, moreover, able to develop excellent rapport with certain leaders of the pro-Japanese pressure groups. The parent pressure group I shall call the Resegregation Group. It was also known at various times as the Saikakuri Seigan and the Sokuji Kikoku Hoshi-dan. Membership in this group was by families. To the best of my knowledge, adult aliens and citizens and also minor children were considered members. In August of 1944 this body sponsored an auxiliary body for young men. This auxiliary body I shall call the Young Men's Fatherland Group. It was also called at various times the Sokoku Kenkyu Seinen-dan and the Hokoku Seinen-dan. Most of the members of this auxiliary body were to the best of my knowledge citizens of the United States. From May of 1944 until his internment in December of 1944 I was a regular visitor at the apartment of the man who, in my opinion, was the most influential leader of the Resegregation Group. He was also one of the two advisors to the Young Men's Fatherland Group and was an Issei. From July of 1944 until his internment in December of 1944 I frequently visited the other advisor to the Young Men's Fatherland Group who was a Nisei about 45 years old. This man was also alleged to be the leader of a gang of terrorists

who assaulted persons who criticized either of the groups. I was also very well acquainted with and frequently visited four additional influential leaders of these groups. I was casually acquainted with others.

In this document it will be cumbersome to state specifically whether an informant was a member of one or the other group. The organizations were most intimately related and many or most of the members of the Young Men's Fatherland Group were members of the Resegregationist Group. On the other hand, older men, almost all of whom were Issei, advised the Young Men's Fatherland Group and, in my opinion, formed most of the policies of this youths' organization.

In addition I also developed good rapport with the chairman and other members of the body which was responsible for the much publicized demonstration of November 1, 1943. Many of these men later became very hostile to the aforementioned Resegregation Group.

In addition to the persons described above I consulted a large number of other informants, some of whom were hostile to the Resegregation Group, some of whom disapproved of the group, and some of whom attempted to remain neutral. Some of these informants were nominal members of the Resegregation Group and some were not. Among my informants were Issei, Nisei and Kibei. I was, in fact, the only Caucasian who, in substance, made daily visits to the apartments of the Japanese resi-

dents of Tule Lake Center. I was also one of the very few who regularly entered the Center on foot and without an escort.

Maintaining contact with my informants in the face of the prevailing evacuee fear of being thought an inu required much tact and patience. I carefully arranged my visits so that I would not be observed by neighbors. I paid many visits during inclement weather when most of the residents remained indoors. The frequent severe dust storms, the bitter winter winds, and the thaws which rendered parts of the Center nearly impassable to a person not wearing heavy boots, provided ample opportunity for such visits. During periods of extreme community tension and fear, such as that which followed the murder of Mr. Hitomi, I corresponded with informants. In fact, after this murder one of my informants warned me to stay out of the center because the alleged gang leader had boasted that he intended to kill a Caucasian, and I, who entered the remote parts of the Center without escort, was particularly vulnerable. In my opinion, the fact that Tule Lake was a large community and that, except for the Resegregation Group it was socially disorganized to the extent that residents were inclined to confine their social activities to the blocks in or near which they lived, gave me a distinct advantage. Informants, in general, had little opportunity to discover who my other contacts were. I revealed no names. If, therefore, I visited an ardent member of the Resegregation Group and ap-

peared to sympathize with his views, he had little opportunity to discover that when I visited an individual who was hostile to the group, I gave the contrary impression. This was particularly important in regard to my contacts with the Resegregation Group leaders. Had my ordinary informants realized that I was on good terms with these powerful individuals, I would have gained little reliable data on how ordinary folk viewed the activities of the Resegregationists.

The greater part of my field notes were taken down in approximately verbatim form. When the statements of evacuees appear in this document, they are reproduced, substantially without editing.

I intend to describe those sociological phenomena which I observed in the Tule Lake Center which bear on the renunciation of citizenship. Insofar as my data indicate, I shall state my opinions in regard to the motivations which led the citizen residents of Tule Lake to commit this act. Since I am of the opinion that the activities of the aforementioned Resegregation Group had an important bearing on the renunciation of citizenship, I shall present the history of the development of this group in considerable detail. This, in turn, will require a brief explanation of the sociological developments in the Tule Lake Center which preceded the formal organization of the Resegregation Group.

I was residing in the Gila Relocation Center when the policy of segregation was announced to the

evacuees in the summer of 1943. What data I obtained in the Gila Center in no way contradicts the discussion of segregation presented by Dr. Thomas and R. Nishimoto in *The Spoilage* (pp. 84-112) or the analysis presented by the WRA Community Analyst, Dr. Morris Opler, in *WRA Community Analysis, "Studies of Segregants at Manzanar."* These authorities in substance hold that the reasons evacuees decided to become segregants and thereby assume the status of individuals disloyal to the United States were: fear of being forced to leave the Centers and face a hostile American public; concern for the security of their families; fear on the part of evacuee parents that their sons would be drafted if they did not become segregees; anger and disillusionment owing to the abrogation of their citizenship rights; bitterness over economic losses brought about by the evacuation. I was also told by a Japanese informant that some Issei believed that Japan was going to win the war and that they would eventually reap benefits if they went to Tule Lake.

Most of the segregees entered the Tule Lake Center in September and October of 1943. They were at this time far from homogenous in status (loyal or disloyal) and in sentiment toward the United States. In the segregation movement children who held status as loyal citizens of the United States were allowed to accompany segregee parents. Parents who held status as aliens loyal to the United States were allowed to accompany segregee

children. Moreover, over 1,000 pre-segregation residents of Tule Lake ineligible for segregation refused to leave that Center and were allowed to remain there. Therefore, at one extreme of the population were individuals who, when I made their acquaintance in Tule Lake, voiced sentiments which were decidedly pro-Japanese. At the other extreme, in my opinion, was a significant proportion of the population which had no intention of going to Japan and felt no sentiments resembling loyalty to Japan whatever. Between these two extremes was the bulk of the population—the fence-sitters. Such persons, when I made their acquaintance, told me that they had come to or remained in Tule Lake to make up their minds. In my opinion, they did not look upon segregation as a final step committing them to inevitable expatriation or repatriation. Informants belonging to this group repeatedly made statements to me which may be paraphrased as follows “All I want is that they let me stay here in peace until the end of the war.” It is my opinion that these persons regarded Tule Lake as a refuge where they might remain in relative safety from the economic hardships and physical danger which they feared would be their lot if they attempted immediately to reestablish themselves in the United States.

It should be stressed that the groups described above were not static. Individuals and groups vacillated constantly as they were swayed by events, news, and rumors. A resented administrative policy

or a newspaper report of an assault upon Japanese residing outside of the Centers would, for a period of time, increase the number of evacuees who believed that the United States held no future for them. This vacillation was one of the more salient social phenomena of Center life. Many of the phenomena hereinafter described cannot be evaluated properly unless it is kept in mind. Prolonged insecurity and indecision may unbalance even individuals who possess great mental stability. In view of the fact that the substantial majority of the residents of Tule Lake had been in a state of indecision for almost four years, it is not surprising that they believed fantastic rumors, that they frequently did not think or act logically, that they were prone to take what appeared the immediate path to safety, and that they were predisposed to fall into mass anxiety which on several occasions rose to panic.

I did not visit the Tule Lake Center until February 1 of 1944. Consequently, I was not residing there when the events I shall outline briefly below took place. My statements are based on a great deal of data acquired after my arrival and on WRA documents.

It is my opinion that the demonstration of November 1, 1943 resulted substantially from a widespread evacuee sentiment that the living facilities in Tule Lake stood in great need of improvement. The listing of these alleged grievances would require many pages. On October 15, 1943, a truck

transporting Japanese workers to the project farm turned over. Some 30 men were injured, several severely. One died within a few days. The Japanese farm workers refused to return to work. The residents, under the guidance of leaders who had attained some prestige in the Relocation Centers from which they had come, selected a Representative Body. This body determined to use the farm work stoppage as a means of obtaining a mitigation of the grievances referred to above. I am of the opinion that at this time the Japanese Representative Body had strong support from the general residents.

On October 26, 1943, certain members of this Representative Body approached the Project Director, stating that the farmers were resolved to continue their work stoppage until the administration gave assurance that the complaints of the residents would receive attention. At this time, only the farmers had stopped work. The Project Director promised to do what he could to relieve the situation. However, without acquainting the Representative Body or the residents with his intention, the Project Director brought in non-segreguee Japanese from the Relocation Centers to harvest the crop. This action on the part of the Project Director deprived the residents of their only important bargaining point: the fact that the valuable potato crop would spoil with great loss if not harvested immediately. Moreover, it is my opinion that this action was viewed by the segreguees as a breach of

trust on the part of the Administration. I believe that it greatly increased segregee hostility against the WRA administration.

On November 1, 1943, Mr. Dillon Myer, National Director of the WRA, visited the Tule Lake Center. Seizing this opportunity to appeal directly to him, the leaders of the Representative Body engineered a mass demonstration during which a crowd of segregees, variously estimated at from 5,000 to 10,000 surrounded the administrative buildings. According to WRA documents the behavior of this crowd was most orderly. However, a group of young Japanese entered the hospital. They attacked and severely beat the Caucasian Chief Medical Officer, who, in my opinion, was extremely unpopular with the Japanese residents. It is my opinion that these assailants had no connection with the leaders of the Japanese Representative Body. When order had been restored, the leaders of the Representative Body again presented the list of the residents' grievances. Mr. Myer promised to investigate the complaints and take action if they were justified. He made such a statement to the crowd which then dispersed quietly.

On the night of November 4, 1943, a fight broke out between a group of young Japanese men and a few Caucasians. Later, a Japanese informant told me that he had been the leader of this group of Japanese. He stated that this group had taken it upon themselves to watch the project warehouses at night in order to prevent the WRA administra-

tion from transporting food to the harvesters from the Relocation Centers. It is my opinion that this informant in this regard was telling the truth. While this fight was taking place, the Project Director requested the assistance of the Military Police. The Military assumed control of the Center. On the night of November 4 the Military arrested 18 young men found in the administration area, released 9 of them and confined the remainder.

Many informants told me later that on the night of November 4 they were not aware of the fact that the Military had assumed control of the Center, and that they set out for work the next morning as usual. This statement is credible for the evacuee residence section was at a considerable distance from the administrative section. In any case, a large number of evacuees approached the administrative section on November 5 at the beginning of the working day. They were probably joined by the relatives of the Japanese hospital staff, which had not been allowed to return to the Japanese section by the Military. These persons were met by a cordon of soldiers and told to return to their barracks. When these orders were not obeyed, the soldiers released tear gas into the crowd. Ten months later, informants still spoke of this event with great bitterness, holding that it was not just to throw tear gas at them when they were attempting to go to work.

The construction of a "man-proof" fence, separating the administrative buildings from the Japa-

nese residence section was now begun. All Japanese work in the administrative section was temporarily suspended, since all residents were confined to the Japanese section. Within a few days the Japanese hospital staff and reduced garbage and coal crews resumed work as a result of a conference between the Military and members of the Japanese Representative Body. The Military, I was told, decided to cut the garbage and coal crews to one-third of their former size. This created difficulties for the Japanese Representative Body, which was caught between the stand of the Military and the attitude of the Japanese residents who did not understand why some persons were allowed to return to work while others were not. Both parties then agreed to hold a mass meeting at which the Lieutenant Colonel and members of the Japanese Representative Body would speak, each explaining the situation to the residents. When this matter was put before a session of the Representative Body a factional dispute arose, certain members holding that the Military was not allowing the Japanese sufficient time to speak. Despite strong opposition from the chairman of the Representative Body the anti-mass meeting faction swayed the body into voting not to attend the mass meeting. Messages to this effect were thereupon sent to each block and read in the mess-halls. The Military was not informed of this decision. At the appointed time, the Lieutenant Colonel and the regional director of the WRA entered the camp with a strong military escort and

took their places on the outdoor stage. No Japanese came to hear them. They delivered their speeches, nonetheless.

On the same day, November 13, the Military declared martial law to be in effect. The Military also began to arrest the leaders of the Representative Body, some of whom went into hiding but gave themselves up voluntarily on December 1, 1943. Other men, suspected of being leaders, were arrested. A stockade was built to house these detainees.

After the declaration of martial law and the arrest of these leaders the residents entered upon a partial strike. In substance, they refused to return to work until the apprehended men were released. Doctors, nurses, mess workers, block managers, and the coal and garbage crews continued to work. The Military continued to make arrests and by mid-December of 1943 over 200 persons were confined in the stockade.

For over two months the residents maintained their partial strike. However, as the weeks passed, the monotony of a life without employment or recreation, the strict curfew, and the hardships imposed by the loss of the monthly pay check and clothing allowance markedly decreased the enthusiasm of the early period of the strike. In mid-December of 1943 a new group of Japanese leaders arose and with strong assistance from the WRA administration attempted to influence the residents to abandon the partial strike. In mid-January of

1944 a ballot was arranged and the residents voted to stop the strike by a plurality of 473 out of 8,713 votes cast. The WRA resumed control of the Center, using the new group of leaders, the Coordinating Committee, as a liaison body between the administration and the residents. Jobs were quickly filled and evacuees were now allowed to enter the administrative area with a pass, submitted to the sentry at the gate.

Twenty days after the referendum vote had been cast I made my first visit to the Tule Lake Center. It is my opinion that at this time even conservative residents deeply resented the past policies of the WRA administration and that they disliked and distrusted the administrative sponsored Coordinating Committee. Many persons claimed that the members of the Coordinating Committee were not their elected representatives (as, indeed, they were not). Some informants called certain of the acts of the former Representative Body silly, foolish, and radical, but stoutly maintained that this body had been and still was the legitimate representative body of the people.

In March of 1944, during my second visit to Tule Lake, I became aware of the existence of an underground pressure group. This group spread propaganda and distributed pamphlets which were designed to discredit the Coordinating Committee. This group also agitated to obtain the release of the men detained in the stockade. Some of the members, to my certain knowledge, had relatives

who were detained and who were alleged to have been beaten by the WRA Internal Security on November 4, 1943. It is my opinion that during February and March of 1944 this underground group was not regarded with respect by most of the residents. My informants usually spoke of the group with derogation, calling the members agitators and radicals. In the spring of 1944 this underground group was considerably strengthened by the arrival of certain parolees from Santa Fe, the Department of Justice internment camp. Some of these parolees, I was informed, had contributed to anti-administrative disturbances in Relocation Centers before their internment and in my opinion they were agitators of experience and prestige. In addition the underground group established a connection with a man who, I was informed, was a powerful gang leader from the Manzanar Center. This man, I was told, had led a pre-evacuation gang on Terminal Island, California and was also credited with having instigated much of the violence which occurred in the Manzanar Center in December of 1942. I was personally acquainted with this alleged gang leader and in my opinion he was very clever. He was, in any case, never called to task for these alleged activities by the authorities.

It is my opinion that these experienced agitators took control of the up to this time rather inept underground group which continued to circulate propaganda against the Coordinating Committee and against the WRA administration. I believe and

have data which indicate that they spread rumors to the effect that the members of the Coordinating Committee were inu (stool-pigeons), that they were not "true Japanese," and that they had betrayed the people to the WRA administration. They added to the constant stream of rumors that the members and supporters of the Coordinating Committee were being paid large sums of money by the WRA administration and that they were making large profits in graft at the expense of the residents and with the connivance of the administration. The officers of the Center's Cooperative Enterprise, who had substantially supported the Coordinating Committee's political coup were particularly singled out as inu and grafters par excellence.

The Coordinating Committee countered with propaganda to the effect that the activities of the underground group were "un-Japanese" and that "true Japanese" were persons who behaved in an orderly manner and did not bring hardship and misery upon their fellow residents.

The propaganda of the underground group was by far the more effective. Many of the residents were disgruntled and bored. Probably one-third of the employable residents were not given work, since the Center was so crowded that jobs were not available. The residents, in short, were predisposed to repeat, and to some extent believe, almost any rumor about the inu. Many, however, continued to voice disapproval of the underground agitators.

In April of 1944 the underground group emerged

and adopted the name Saikakuri Seigan (literal translation is "Appeal for Resegregation"). This body will hereafter be called the Resegregation Group. The leaders sent a letter signed by an unimportant member of the organization to Attorney General Biddle, requesting permission to circulate a petition for the signatures of those residents who desired early return to Japan and who, meanwhile, wished to be separated, in Tule Lake, from those not so inclined. This letter was channeled to the WRA administration at Tule Lake and permission was given to circulate the petition providing "that the survey will be made without commitment on the part of the administration." I made my third visit to the Tule Lake Center several days after this petition was presented to the people and found the residents in great confusion. Rumors had spread that those persons who did not sign the petition would not be allowed to expatriate or repatriate. The WRA administration had issued a statement that it had no intention of carrying out a resegregation and that no petition had been authorized. Almost all of my informants expressed disapproval of the petition. They stated that they saw no point in separating the residents of Tule Lake on the narrow basis of whether they were willing to return to Japan on the next exchange boat. By refusing to sign the petition, however, they exposed themselves to the epithet of "fence-sitter." Almost every informant stated forcefully that the fence-sitters ought to get out of Tule Lake

but no one admitted that he might be a fence-sitter. The Resegregation Group obtained some 6,500 signatures of citizens and aliens, a figure which includes the dependents and minor children of the signers. In absentia signatures were also accepted. The relatives of men confined in the stockade signed for them. Persons who had signed the petition were thereafter considered members of the Resegregation Group. Many signers were citizens of the United States, although the leadership clique, the policy makers, was almost entirely composed of aliens.

The wife of a leader of the Resegregation Group made the following statement to me in an interview which took place on April 13, 1944. "We're going to stick to Japan. We cannot raise our children overnight to become Japanese subjects." I asked her how the Resegregation Group proposed to distinguish between those residents who sincerely desired to return to Japan and those who did not. She said, "Those guys who won't say 'Yes' to the petition are the guys who are going to stay here (in the United States)." I then asked her what was to be the fate of the thousands of people who had not signed. She replied, "Those other people—they didn't stick up for us in the crisis. It's not our business to worry about them."

In addition to stirring up a great deal of excitement and confusion, the petition put the harassed Coordinating Committee out of existence. The members of this body resigned, telling me that they

bitterly resented the fact that the WRA administration, without consulting them, had recognized their political opponents to the extent of allowing the circulation of the petition. From this period (late April, 1944) until the end of my stay in the Center (May, 1945) the Japanese residents of Tule Lake had no formal representative body which might present community problems to the WRA administration. The WRA made an attempt to sponsor such a body. The Resegregation Group vigorously opposed this attempt. Many informants held that a person who accepted a position on this proposed representative body would be called an inu.

The leaders of the Resegregation Group, in my opinion, now turned their energies to activities calculated to keep the Center in a state of turmoil. They told me frequently that thereby that would prove to the WRA authorities in Washington that trouble would not stop until a resegregation took place. The leaders continued to spread propaganda against the now ex-members of the Coordinating Committee and other so-called inu, who were usually individuals who counselled a modicum of cooperation with the administration and/or criticized the policies of the Resegregation Group. For instance, a leader of the Resegregation Group told me that Mr. Hitomi, the general manager of the Co-Operative Enterprise, had attempted to bribe the alleged gang leader and Resegregationist with a large sum of money to influence the recently arrived segregees from the Manzanar Center to join the Tule Lake

Co-Op. This and similar stories were widely circulated. In this regard it is significant that much later the Project Attorney, Mr. Noyes, told me that an officer of the Co-op had made an affidavit to the WRA Internal Security that this alleged gang leader repeatedly threatened the officers of the Co-op. This affidavit was submitted just prior to the relocation of the affiant.

A series of assaults added to the mounting tension. Certain men, some of whom, in my opinion, had openly criticized the activities of the Resegregation Group were attacked at night and severely beaten. Mr. Hitomi's brother was beaten and is said to have suffered a fractured skull. The wife of a leader of the Resegregation Group bitterly criticized before me a certain man who was openly protesting against the Japanese drills in which children were urged to participate. Shortly thereafter, this man was beaten. Several of the beatings, I was told by informants, were engineered by the alleged gang leader. Each beating was followed by rumors that the victim had been an inu (stool-pigeon). None of the assailants were apprehended by the police. On the morning of July 3, 1944, Mr. Hitomi, the General Manager of the Co-op and an alleged inu, who had been the object of particularly vicious gossip, some of which, in my opinion, was spread by leaders of the Resegregation Group was found before the apartment of a relative with his throat cut. I was told that the remaining members of the Co-op's Board of Directors received an anonymous

communication to the effect that they would be next. The Japanese members of this board resigned in a body. About 15 of the most notorious inu, including the evacuee chief of police, fled from the Japanese section with their families and were given temporary quarters on the administrative side of the fence. Shortly thereafter, the Japanese members of the Internal Security resigned. (Later, after considerable difficulty, wardens were recruited with the understanding that they were expected only to keep order in their own blocks.) The residents of the Center were so frightened that I was unable to pay visits for several weeks. Several informants requested that I never call on them again.

The WRA Internal Security attempted to apprehend these assailants. They could accomplish little, however, against the tremendous fear of being stigmatized as an inu.

From this point forward many of my informants began emphatically to express dissatisfaction over the lawlessness and, as some termed it, the gangsterism and hoodlumism which prevailed in the Center. Repeatedly, they voiced the desire that they might get some peace and order. No one, however, dared to state that someone ought to inform to the administration. The following statements are typical:

July 24, 1944: an Issei:

"In this camp no really able man will show his face because so many narrow minded fanatics are in camp. . . . Even your safety cannot be guaran-

teed. . . . These agitators think that by making trouble here they are doing good for Japan. That's extremely wrong."

On July 19, a Kibei girl, a teacher in one of the Japanese language schools, made the following statement:

"My students are asking me, 'Sensei (teacher),' they say, 'What would you think if I got leave clearance and got out of here?' . . . They say: 'Gee whiz, what's going to happen to us?'"

On July 13, 1944 the project newspaper, the *Newell Star*, published a statement explaining that the Congress of the United States had passed a law which provided that a citizen of the United States might make a formal written renunciation of nationality. No informant commented upon this statement in the month that followed.

On August 12, however, the Resegregation Group leaders organized a young men's group ostensibly devoted to the study of Japanese history and culture (the *Sokoku Kenkyu Seinen-dan*, hereafter called the Young Men's Fatherland Group). Among the formal aims of this young men's group, which, to my knowledge, were not at this time publicized among the general residents was the following statement:

"Since the outbreak of war between Japan and America, citizens of Japanese ancestry have moved along two separate paths: (1) for the defense of their civil rights on legal principles, and (2) for the renunciation of their citizenship on moral principles."

Two prominent leaders of the Resegregation Group were the advisors to the Young Men's Fatherland Group, but this fact was at first carefully concealed from the WRA administration and, so far as I was able to determine, from the general residents. In fact, to the best of my knowledge and belief, until September 24, 1944, the connection of this group with the Resegregation Group was very carefully concealed from both the Administration and the residents. The first meeting of this organization was held in the high school auditorium with the permission of the WRA. Some of my informants stated that they believed the contention that this organization had no political aims and joined it. In my opinion, they were telling the truth, for in November of 1944, they attempted to withdraw. A few expressed suspicion of the leaders. Within a few weeks, the organization claimed some 600 members, most of whom were citizens.

This organization obtained office space from the WRA. Frequent meetings were scheduled for its members. As the weeks passed, the speeches delivered at these meetings took on an increasingly Japanese nationalistic tone. Outdoor exercises which took place before dawn were made compulsory for members. Gradually these exercises became more militaristic. Week by week additional militaristic features were added. Bugles were purchased. By late November of 1944 members were wearing uniforms consisting of a sweat shirt bearing the emblem of the rising sun even when they

entered the administrative area. They were also required to shave their heads in imitation of Japanese soldiers.

On October 30, the Issei advisor to this organization explained its aims to me:

“If we were training in open daylight, it will not impress the people much. . . . But by getting up early in the morning, by exercise and training after worshipping and praying for victory and eternal life for our soldiers, these young people can be deeply impressed.”

On August 30, the WRA administration called certain of the leaders of the Resegregation Group into conference and gave them a letter written by Mr. Dillon Myer which was dated July 7. This letter denied any administrative intention of a resegregation. The leaders of the Resegregation Group did not announce this administrative denial to the members of their group. Instead, without the knowledge of the administration, they mimeographed Mr. Myer's letter and distributed it widely, mistranslating the last paragraph as follows:

“However, I am sure that all problems in the Tule Lake segregation center that need attention and improvement will be studied and remedied in consultation with the representatives of the Resegregation Group. . . . Needless to say, I am sure Director Best will be glad to discuss frankly with you the question of resegregation about which your representatives have communicated.”

It is my opinion that by mid-August of 1944, the

leaders of the Resegregation Group, whose plans for a resegregation were not going very well, were giving the political potentialities of the renunciation of citizenship much thought. These leaders frequently brought the topic up in conversation with me. The following statements are typical.

On August 28, the wife of a leader stated:

“We figure that something will have to be done (by the Administration) in September. That’s when the denunciation (not mis-spelling) will come through. If we stay here as we are another trouble (uprising) is going to come up. . . . We’ve been tolerant enough about the school (American school) here.”

On September 7, the Issei adviser to the Young Men’s Fatherland Group speaking of the proposed renunciation, stated to me:

“We don’t know how far this will go. But certainly those who wish for immediate repatriation to Japan and at the same time don’t wish to be inducted into service or relocate wish to renounce their citizenship.”

Despite the fact that the leaders of the Resegregation Group had on August 30 been told by the WRA administration that there was to be no resegregation, they, on September 24, 1944, brought forth another resegregation petition. This petition was accompanied by an explanatory pamphlet in Japanese with an English translation appended. A part of this pamphlet stated:

“Whereas, we realize the uselessness of our

American Citizenship, and so as soon as and in the event a law of renunciation for citizenship becomes effective, we gladly renounce our citizenships. Therefore, we make clearly our positions by being a real Japanese. Furthermore, we be classified clearly as an enemy alien and thereby be treated in accordance with the Geneva Conventions."

I called on one of the most influential leaders of the Resegregation Group, on September 21, three days before the petition was circulated. He showed me the pamphlet and made the following statement, which I recorded verbatim:

"You know the people behind this have been working underground for a long time. Anyone who would have come out openly would have been put in the stockade. We have been working on this since April, awaiting the moment, but we had to keep it secret. Now the time has come.

"If the Administration recognizes this movement, we will have a good mutual understanding. Besides, Mr. Myer sent us a letter and recognized this movement.

"Those who refuse to sign this will have people asking them, 'Are you loyal to Japan or not? If you are not loyal to Japan, why don't you go out?' The people will have to realize this—as long as their appearance is Japanese they will have to sign this. If they don't sign they will be known as not loyal to Japan and will be told in public, 'You are not Japanese. Why don't you go out?'

"Of course, many people who don't want to go

back to Japan will sign this, but then they will go in a corner and keep quiet.”

On September 27, the WRA administration issued a statement that the petition was unauthorized. My data indicate that the Resegregationist leaders continued their efforts to get signatures. On September 30 a married couple, both influential leaders of the Resegregation Group, exhibited anger over the denial of authorization. The husband asked me, rhetorically, “How can you get authority for a petition like this?” He added that the next time his group “put out something” they were going to take the paper to the block manager beforehand “and he better not say anything.” His wife then told me that the Resegregation Group had received a letter from Mr. Ennis of the Department of Justice, advising them to hold on, that everything was going smoothly and that they would be notified when the renunciation of citizenship forms were ready. Concerning the plans of the Resegregationists, she remarked: “We are going ahead even if the people squawk.”

As soon as the petition began to be circulated I attempted to determine how it was being received by the residents. No informant who was not an enthusiastic member of the Resegregation Group spoke in favor of it. I am emphatically of the opinion that the substantial majority of the residents disapproved of the petition and resented the social pressure applied by its circulators. I shall not list all of the derogatory statements made; those that follow will suffice.

On September 26 an Issei informant stated that he disapproved of the petition. He added: "I asked one man, 'Why did you sign the paper?' He said, 'So-and-so said so-and-so and I signed it.' They (persons who behave in this manner) don't have any judgment."

On September 28 an older Nisei informant stated:

"One point I really oppose—they threaten to use force. . . . Many people are wondering whether they should sign or not. They're afraid. Many are being led into it.

"Another thing, I've heard that (the nominal leader of the Young Men's Fatherland Group) stated that they had a number of killers (in his group). Why does he say that?"

On October 2 a male Kibei informant who lived in a block where many members of the Resegregation Group also resided, stated:

"I say, 'Leave me alone and I'll leave you alone!' If I feel like it, I'll sign. I haven't signed yet.

"I'm Japanese no matter what they say. Even if we sign or don't sign it won't do any harm."

On October 12, the same informant stated:

"I don't like the way the Sokoku Konkyu (Young Men's Fatherland Group) threatens people. They say, 'If you don't sign you're going to be drafted.' So a lot of dumb people signed. . . .

"But I think those who signed were wise. I'm too stubborn to sign and that makes me enemies. It's better to be like the proverb: Nagai mono niwa

makerero; okii mono niwa momareyo—let the long snake wind around you; let the big snake swallow you.

“If I were Project Director I would segregate them. I’d give each person a pink paper and a white paper and an envelope. Then those who want to be segregated could sign the pink paper and those who didn’t could sign the white one. Then they could mail it to the WRA and nobody see it. Then I’d like to see how many would sign!”

At this time I was surprised at the almost unanimous disapproval which informants who were not leaders of the Resegregation Group voiced concerning the petition. I was not surprised that they disapproved but that they expressed their sentiments so frankly, for I am of the opinion that the leaders of the Resegregation Group were feared. I also suspected that some of the persons who spoke derogatorily of the petition before me were signing it nonetheless, for it was painful to be told in public: “You are not Japanese.” Moreover, a rumor was widespread in the Center that the Department of Justice was going to take over the Tule Lake Center soon and that when this occurred those persons who had not signed the petition would be forced to leave. Besides, the WRA administration had denied the petition authorization. As several informants stated: “To sign it won’t do any harm.” It is, therefore, my considered opinion that at this period (September and October 1944) a very substantial proportion of the residents disapproved of

the activities of the Resegregation Group, and that they were irked by the demand that they commit themselves to an early return to Japan. Many, however, signed the petition to be on the safe side whatever transpired. Without doubt, however, there were a number of individuals who signed the petition through the desire for an early return to Japan.

In my subsequent visits to the leaders of the Resegregation Group, I was impressed by the fact that though they boasted of the number of signatures they were getting (10,000) they were not pleased by the reception the petition was getting from the people. Moreover, it is my opinion that certain residents were beginning to take steps toward an organized resistance. One of my informants, an elderly Issei, told me that he advised persons who consulted him not to sign the petition. He also told me that he had made a speech before a group of Nisei telling them that nothing would be gained by making trouble and that agitation only brought suffering upon the women and children in camp.

“I said that this camp is no place for young men to make trouble. They should study. I said, ‘Young men, behave yourselves.’ ”

During an interview which took place on October 10, 1944, this informant denounced the Resegregationists leaders to me, stating that they were misleading the youth of the Center. He stated: “I say the Japanese government is not so narrow minded as you.”

I was concerned for the safety of this informant who, in my opinion, was showing unusual courage in speaking publicly against the Resegregation Group. I warned him that one had to be careful what one said in camp, for there were dangerous men about. He laughed and called the Resegregationist leaders cowards. Five days later, while he was returning from an evening meeting of his church in the company of two elderly Issei friends, he and his friends were attacked by a group of assailants and beaten severely. When he recovered, he told me:

“The three of us were coming home from a religious meeting at block 52. I heard noisy footsteps. One of my friends was at my side, the other was 15 feet ahead. The first man who was attacked yelled. I turned around and saw that big stick. I can still see the club like a frozen picture, but I didn’t see anything after that.”

This informant also voiced the opinion that his speech before the Nisei had been reported to the Resegregationist headquarters and told me that the attack upon him had been instigated by one of the advisors of the Young Men’s Fatherland Group, the alleged gang leader. He added that the attack had been led by an Issei who was known to be the so-called gang leader’s right hand man. I was given this information after making a promise of strict confidence. My informant feared that if he testified against his assailants, the gang would attack his children.

At this time the rumor that another man named Tambara had been threatened spread widely through the Center. The wife of the Issei advisor to the Young Men's Fatherland Group told me: "They wrote him, 'Would you like to be another Hitomi?'" (Hitomi was the man murdered on July 3, 1944.)

On October 21 the alleged gang leader addressed the members of the Young Men's Fatherland Group. At this meeting several informants told me that he incited the young men to violence and promised to take care of them if they got into trouble. Several informants stated with disapproval that he had quoted a Japanese proverb, which like many proverbs, is flexible in interpretation. It may, however, be translated to mean: "To help the cause, we must kill those who stand in its way." Most informants translated it: "The little guys must die so that the big guys may live." They left no doubt in my mind, however, that they believed that the so-called gang leader was threatening persons who opposed the policies of the Resegregation Group with violence.

I called on this alleged gang leader several times during this period and we had lengthy conversations. During my visits his outer office (he was a block manager) was occupied by several muscular young men. While conversing with him I was obliged to sit so that I faced a large Japanese flag. On October 23 he told me that during a recent altercation he had had with the Project Director a

group of "70 or 80 boys" had surrounded the block manager's headquarters and "demonstrated their offensive spirit."

On October 30 the aforementioned right hand man of the alleged gang leader knifed a young Nisei. I was told by several informants that the father of the victim had been a Resegregationist, had "found out how rotten they were" and had publicly criticized the alleged gang leader. The Project Attorney, Mr. Noyes, told me that the victim gave less and less incriminating evidence every time he testified in the hearings held by the WRA Internal Security. The Issei advisor to the Young Men's Fatherland Group accompanied the defendant to his hearings and his trial before the Modoc County authorities and vouched for him. The defendant was given a sentence of 90 days. Later, informants reported that the alleged gang leader and the Issei advisor were boasting that this light sentence was evidence that they could protect their own.

During this period one of my most reliable informants, a Nisei and a veteran of World War I, told me that he had been repeatedly threatened with physical violence because he openly criticized the Resegregation Group and the alleged gang leader. I was on excellent terms with this informant and interviewed him frequently for over a year. In all of this time, he, to the best of my knowledge, never misinformed me deliberately. I believe, therefore, that from mid-October until the end of No-

vember 1944, this informant lived in expectation of a violent physical assault from the Resegregationists. He showed me a black-jack which he carried whenever he left his apartment at night. After the beating of my Issei informant and the knifing, this informant stated that he thought matters had gone far enough. He thereupon sent a written denunciation of the alleged gang leader out of the Center to several Japanese friends, with the instruction that if he were beaten or killed or if he gave the word, this denunciation was to be given to the Federal Bureau of Investigation. He then informed the alleged gang leader of this action and stated that if another beating occurred, he would denounce him. No more beatings occurred that came to my attention. Moreover, shortly thereafter, the alleged gang leader resigned his position as advisor to the Young Men's Fatherland Group, a fact which I checked with leaders of the Resegregation Group.

I affirm that to the best of my knowledge and belief many residents of the Tule Lake Center and I myself, believed that one of the advisors to the Young Men's Fatherland Group led a gang which assaulted persons who criticized the policies of the Young Men's Fatherland Group and the Resegregation Group. I also affirm that many residents believed that persons who opposed the Resegregation Group were in immediate danger of physical violence from this gang.

On November 3, 1944, the Resegregation Group and the Young Men's Fatherland Group vigor-

ously sponsored a pretentious ceremony to celebrate the birthday of the emperor Meiji. Non-members were forbidden to attend this ceremony. I was invited to attend this ceremony as a guest and did so, deeming it an opportunity to gain some idea of the numerical strength of the supporters of the group. Since the participants stood motionless for over an hour, I had an excellent opportunity to count them. Approximately 600 members of the Young Men's Fatherland Group were present and approximately 1,800 additional adults and children. This is significant, for the birthday of the emperor Meiji was considered an important holiday and any member of the Resegregation Group who did not attend this ceremony could not, in my opinion, have been an enthusiastic member. Moreover, if he did not attend he stood in danger of serious reproof from fellow members.

It is my considered opinion that until December of 1944 the substantial majority of citizens residing in the Tule Lake Center were not markedly interested in the renunciation of citizenship and did not welcome the opportunity to renounce. On August 14, 1944, the first Japanese who was not intimately connected with the leadership clique of the Resegregation Group introduced the subject of the renunciation into conversation with me. Between that date and December 5, when Mr. John L. Burling of the Department of Justice arrived at the Tule Lake Center, I had 95 interviews with informants (excluding all interviews with leaders of the Resegre-

gation Group). To my certain knowledge some of these informants were nominal members of the Resegregation Group. Others were not. Some 80% of my informants were citizens. Approximately 60 of these interviews were very extensive, lasting several hours or an entire afternoon. All of the interviews were informal, for it was my policy to allow the informant to direct the greater part of the conversation. Almost invariably, when informants were concerned over a matter, they introduced the subject into our conversations.

In the many pages of verbatim data I collected between August 14, 1944 and December 5, 1944, the renunciation of citizenship was mentioned six times by informants who were not leaders of the Resegregation Group. Only one informant stated that he intended to renounce. This man, an extremely reliable informant who was hostile to the Resegregation Group stated that he intended to renounce because he had committed himself to return to Japan and would not break his word. On September 4, he stated:

“If there are people who will renounce their citizenship merely to escape the draft it would be a good thing if the (American) government sent them first to Japan—then they’ll get drafted there.

“When it comes to a final showdown, I think most of the Nisei will turn it down (will not renounce) . . . Roughly 60% of the people in camp are citizens. I think if 50% (of the citizens) renounce their citizenship, they’ll be doing good. It may be less.”

On September 26, the Issei informant who was later assaulted, stated:

“My common sense opinion is this: from the Japanese part, the right of American citizenship is already denied. So it is not necessary for them to make formal declaration of denouncing it.”

It is my opinion that at this period (August 1944 through November 1944) the attitude of the leaders of the Resegregation Group regarding the proposed renunciation of citizenship was in marked contrast to that of the residents who were not members of this group and to many residents who were nominal members of this group. I believe that the leaders of the Resegregation Group during the months of October and November 1944 expected that the jurisdiction of the Tule Lake Center was soon to be taken over by the Department of Justice. I believe that they anticipated that an especially early and enthusiastic eagerness to renounce citizenship would cause the members of their group to be recognized by the Department of Justice as individuals particularly worthy of remaining in Tule Lake (under the Department of Justice) while the “fence-sitters” whom they stigmatized as “not loyal to Japan” would be forced to leave the Center. In fact, they repeatedly attempted to give me the impression that they were in almost constant correspondence with the Department of Justice and I am certain that they also gave members and residents this impression.

On October 5, 1944, an enthusiastic member of the Young Men's Fatherland Group and the Resegrega-

tion Group told me that during a conference with Mr. Best, the Project Director, the Director had told him that it was almost a certainty that the Tule Lake Center was going under the Department of Justice within 60 days. On October 6, the Project Attorney, Mr. Campbell, told me that the WRA administration was seriously considering making an announcement to the Japanese residents that the Tule Lake Center was to be transferred to the jurisdiction of the Department of Justice. On October 9, the wife of a leader of the Resegregation Group told me that the petition of September 24 had 10,000 signatures and added:

“We are not going to take any more (signatures) because soon we’ll be under the Justice Department.”

On October 10 Mr. Dillon Myer addressed the WRA staff at Tule Lake and stated according to my notes which are not verbatim that “he didn’t know to whom the Tule Lake Center was going to be turned over.”

On October 16 the young Resegregationist who stated that he had had a conference with Mr. Best, told me:

“If the Justice Department does not take over it would put me in a tough spot because I made a report to the Resegregation Committee that they (Justice Department) would take over in 60 days. Mr. Best (the Project Director) definitely told me that this would take place within a week after the (presidential) election . . . When I made this report

to the Resegregation Committee, they were very happy over it."

On October 16, an informant who disliked the leaders of the Resegregation Group, and, in my opinion, was repeatedly threatened by them, stated:

"The Resegregation Group are bragging throughout the camp that it is because of them that the camp is going under Justice. I said to one, 'If your influence is so great as that, you could do much more for the Japanese in other ways.' "

On October 23, the alleged gang leader and advisor to the Young Men's Fatherland Group told me:

"The people are anxiously awaiting for the denouncement of it (citizenship). When Mr. Best made the statement that within 60 days the camp would be under Justice (Department) the people were delighted. We more or less expect it."

I am informed that in the latter part of October 1944 the Department of Justice began to receive petitions for permission to renounce citizenship bearing the signatures of many persons and also received requests for renunciation which were typewritten forms imitating the official forms. Such forms, I am told, were not accepted.

On December 12, the young Resegregationist who told me that he had conferred with the Project Director and been told that the Center was soon to go under the Department of Justice told me:

"Mr. Best (the Project Director) double-crossed me again. Mr. Best told me definitely that type-

written copies (of renunciation forms) would be sufficient and for me to send in the typewritten copies. I was on the spot (before the Resegregationists) because I reported this.”

On December 9, a young Kibei who resided in a block where the Resegregationist Group was very strong, told me:

“The Sokoku bunch (Young Men’s Fatherland Group) want to go (to Japan) earlier than any of the rest.”

Her husband added:

“The Sokoku bunch typed their forms on the typewriter so that they could be the first ones. I told our neighbors that their forms wouldn’t be any good.”

I am strongly of the opinion that the leaders of the Resegregation Group were substantially if not entirely responsible for the aforementioned petitions and improper forms and that they hoped by an early renunciation on the part of their citizen members to achieve their long sought goal—resegregation. I have no information on the manner in which the proposition to renounce en masse was put before the members. It is probable, however, that the suggestion was placed before the young men at a meeting or meetings. Whether this is so or not, it is my opinion that members of the Young Men’s Fatherland Group who, at this time, refused to apply for renunciation of citizenship or spoke against the suggestion stood in danger of physical violence from members of their own group and

knew that they stood in such danger. I have no explicit data that such threats were made.

Mr. Burling arrived at the Tule Lake Center on December 5, 1944. I was told that he had come to initiate the hearings for renunciation of citizenship. Several of my informants apparently believed that the fact that Mr. Burling was calling the leaders of the Resegregation Group and the Young Men's Fatherland Group to see him indicated that these leaders might be apprehended and punished.

On December 14 an Issei informant told me:

"I've heard that 18 of the Resegregationists have been called in. The people first thought they were arrested by the FBI. All of them (the people) are pleased, excepting those who are members, of course. They (non-members) want them to be taken away."

He added:

"The members of the Sokoku (Young Men's Fatherland Group) are narrow minded. Many of them were sorry after they signed and found out what was inside. But if they change their signatures, they're scared. So they can't cancel their signatures, not even if at the same time they didn't want to be one of them."

(In my opinion, this informant was referring to cancellation of membership, not cancellation of renunciation of citizenship applications.)

On December 15 a Nisei informant told me:

"I heard that their (Resegregation Group) leaders were being pulled in. But we don't discuss those things openly. It isn't healthy."

I visited a number of the leaders of the Resegregation Group and the Young Men's Fatherland Group at this time and observed that some of them appeared frightened by the tone of their hearings with Mr. Burling. The chairman of the Young Men's Fatherland Group asked me why the first question Mr. Burling asked at the hearings was, "Are you a member of the Sokoku." He expressed the opinion that renunciants should only be questioned on their desire for renunciation of citizenship. Another member of the Young Men's Fatherland Group who was present stated: "We haven't been influencing anybody to take out renunciation papers, even though the administration says we have."

From December 8, 1944, until December 17, the date on which the residents heard that the Western Defense Command was about to withdraw the public proclamation and orders of 1943 which had ordered the exclusion of persons of Japanese ancestry from the West Coast, no informant who was not an ardent Resegregationist, stated that he intended to renounce his citizenship. On December 11 a Nisei girl asked me if she would have to renounce her citizenship in order to go back to Japan. She stated that she was not going to apply, but added that "there was a big rumor in camp" that those who did not renounce would not be allowed to go to Japan.

On the same day the chairman of the November 1943 Representative Body, who did not renounce his citizenship, stated:

"I'm not going to renounce mine. If a man doesn't have Japanese citizenship and if he renounces it, he'll be without a country . . . I wouldn't want to fool this country or evade any obligation to this country by saying that I wanted to go back to Japan and then stay here."

On December 15, a Nisei girl stated:

"They say it's so hard for you to renounce your citizenship because they want to see that you're not avoiding the draft. There's a rumor going around camp that those who do not renounce citizenship are going to be drafted . . .

"I hear a person say yesterday—a Nisei—'You know, I denounced my citizenship and I hated to go to the hearing.' 'Why?' I asked. He said: 'I have to say awful things about America or they won't give me my renunciation and I don't want to do that.' "

I have now described the sociological phenomena in the Tule Lake Center relevant to the renunciation of citizenship up to the announcement of the lifting of the exclusion orders. My data indicate that up to this time the residents of the Tule Lake Center who were not enthusiastic members of the Resegregation Group or the Young Men's Fatherland Group exhibited no marked desire to renounce their citizenship. It is my opinion that they did not welcome the opportunity to renounce and that a substantial majority of the residents, at this time, had not yet made up their minds whether to return to Japan or not. Yet on December 26, 1944, some 2,000 applica-

tions for renunciation were received by the Department of Justice. In January, 1945, 3,400 additional applications were received. My data indicate and it is my opinion that the announcement of the lifting of the exclusion orders and the policy followed by the WRA administration and the Department of Justice from the middle of December 1944 through January 1945 produced a state of mind among the citizen and alien residents of the Tule Lake Center which was substantially responsible for the majority of applications for renunciation. The paramount reason for renunciation was, in substance, the fear that those persons who did not renounce their citizenship would be forced to relocate.

This phenomenon may be difficult for a person who has not been a segregée to understand. Certainly, an outsider after reading this document would be inclined to conclude that a logical person or even one possessing ordinary common sense ought to have welcomed the opportunity to get out of Tule Lake. Emphatically, it is my opinion that this was not so. The segregées had been stigmatized as "disloyal to America" and as "rioters." They feared that if they took up residence outside the Center they would meet grave economic hardship and discrimination; they feared physical violence from Caucasians if they relocated; they feared that their sons would be drafted; parents feared that if they allowed their Nisei children to relocate they would lose touch with them and that they, the parents, might be obliged to return to Japan alone.

The total effect of these fears produced a phenomenon which amounted to far more than the sum of its parts. The residents of Tule Lake had been confined in various Centers for almost four years. It is my opinion that they were predisposed to fall into mass anxiety and mass hysteria, conditions which are not accompanied by logical or well considered action. If the facts and suggestions presented above are kept in mind, the events to be related will be easier to understand.

On December 17, 1944 the residents learned of the proposed lifting of the orders excluding Japanese from the West Coast. On December 19 the project newspaper, the Newell Star, announced "that the new system will permit the great majority of persons of Japanese ancestry to move freely anywhere in the U. S. that they wish to go." It added that "after January 20 all restrictions will be lifted except in the cases of individuals who will be specifically and individually notified." On the same day a mimeographed announcement by Dillon Myer was distributed among the Japanese residents to the effect that "all relocation centers will be closed within a period of six months to one year after the revocation of the exclusion orders." The same day, Mr. Best, the Project Director of Tule Lake, announced to the Japanese residents that "the Tule Lake Center will be considered a relocation center and a segregation center for some time to come. Those whom the Army authorities designate as free to leave here will be in the same status

as residents of a relocation center." The Army Team of some 20 officers began to hold hearings on December 18 or 19. Only male residents were called to these hearings.

Residents whom I visited in the week following the announcement appeared shocked and surprized. Some expressed anxiety. No one, however, stated that he would take advantage of this order and relocate. Instead, a number of rationalizations were voiced, to the effect that they, as segregees, would be allowed to remain at Tule Lake. When, however, the male residents were called for their Army hearings, most of them were not given detention orders. Within a few days it became apparent that segregee status was no guarantee that they might remain in Tule Lake.

On December 24 a Nisei girl told me that she was worried by the results of some of the Army hearings to which young men of her acquaintance had gone. In spite of their pro-Japanese statements, they had not been given detention orders. On the same day a Nisei boy told me that he had just returned from his Army hearing. He stated that the soldier had asked him if he wanted to renounce his citizenship. "So I said I was going to renounce, because I figured that then I could stay in Tule Lake." He assured me that another young man of his acquaintance had stated that he told the soldier he was loyal to Japan and had applied for expatriation but still he was handed a permit to leave camp. pro-

viding he did not go to certain exclusion areas. The sister of this informant then asked me: "They (WRA) won't force us out, will they? What can we do after everything we had is sold? . . . Our family might be able to get along if we had a lot of boys, but still that won't do any good because they'll have to go into the Army."

On December 19 a Kibei told me:

"Four men in my block were called by the Army. They asked them questions like, 'Do you want to go out or do you want to renounce your citizenship?' "

Realizing the effect that such questions put by Army hearing officers would have on the Japanese residents, I made several attempts to determine whether these assertions on the part of my informants were true. Mr. Noyes, the WRA Project Attorney told me:

"Best (the Project Director) talked to Army officers about the renunciation and resettlement questions (put by Army officers). When Best inquired about the significance of asking if the evacuee had applied for renunciation of citizenship they answered that it was instructions from the Presidio. And they said that they asked about resettlement just to be human."

On December 23, an ardent Resegregationist spoke scornfully of the fear of people who did not desire to leave Tule Lake:

"The fence-sitters say they are going to grab on with their hands (to keep from being forced to

relocate). They say, 'Let the others go first . . . Then when everything's safe, we'll go.' "

On December 29 a Nisei girl stated:

"Are they going to kick us out? What good will that do, when we don't want to get out? . . . We hope that by renouncing citizenship we will be allowed to stay here, but we are not sure. WRA should inform us of this."

I do not affirm that the Army hearing officers asked residents of Tule Lake whether they were going to renounce their citizenship or whether they were going to relocate. I do affirm, that to the best of my knowledge and belief, many residents believed that such questions were asked. I also affirm that this belief, coupled with the statements were asked. I also affirm that this belief, coupled with the statements issued by the WRA administration was in large part responsible for the fact that on December 26, 1944, some 2,000 applications for renunciation of citizenship were received by the Department of Justice.

On December 27 the officers of the Resegregation Group and the Young Men's Fatherland Group were removed from Tule Lake to the Department of Justice Internment camp at Santa Fe. It is my opinion that the relatives of the interned men and other Resegregationists interpreted or chose to interpret this internment as the first step in their long awaited project of a resegregation. Informants stated that relatives of internees were boasting of the "safe" status of the internees and predicting

that within 50 days they would be re-united. The internees would be returned to Tule Lake while persons who were not members of the Resegregation Group would be "kicked out." A rumor, which had probably existed before, became widespread. It held that individuals who had not renounced their citizenship by January 20 would be "kicked out of camp" or would be drafted.

On January 2 a Kibei informant told me:

"They (Resegregationists) keep saying that anybody sent to Santa Fe is taking a step forward to becoming a real Japanese. If this propaganda takes effect it will cause great trouble . . . I think the Hoshi-dan (Resegregation Group) undoubtedly has started the rumor that by renouncing citizenship the people will be allowed to stay here at Tule Lake."

On January 3 a Nisei informant stated:

"The people picked up say they're glad. They say we (persons not interned) are going to be kicked around while they will be safe and sound."

On January 19 an informant told me of a rumor which he said had been current for several weeks:

"They say all those persons who have not renounced their citizenship will be kicked out of camp . . . Some people are also being told to answer in a radical way so that their citizenship will be taken away."

Meanwhile, expressions of anxiety and fear increased in number and in force. Many residents complained that they had been given no specific information by the WRA as to who was going to be allowed to stay in Tule Lake.

On January 2 a Nisei informant stated:

"We wouldn't mind going back to San Francisco if we had everything as when we left it. We'd jump right out. But we've lost everything."

On January 3 another Nisei informant stated:

"I don't know what's going to happen to us! It's very confusing. I think everybody feels that. They don't know what's what yet. In the first place why do they want to kick us out? It's their fault we came here. They can't say, 'We'll give you 25 dollars and coach fare. Get out by such and such a day.'

"Since the people have been in camp three years, their funds are exhausted. It's all right for people who can afford it."

This informant then added:

"Can people be thrown out even if they renounce their citizenship?"

On January 5 the WRA officials reiterated their intention of getting all evacuees who were "cleared" out of all the Centers. An official pamphlet was distributed throughout the Center in which Mr. Myer reaffirmed his earlier statement that the prime objective of the WRA was "to restore the people residing in relocation centers to private life in normal communities." It is my opinion that this statement did not reassure the residents of Tule Lake.

On January 5 an Issei informant stated:

"They (the Japanese) have nothing to depend on . . . I don't know one person who wants to go out."

On the same day a Nisei stated:

"My intention is to stay here until I'm forced out."

On January 8 another Nisei informant stated:

"The people are very much at a loss due to the fact that they can't make a decision. The WRA officials admit they're in the dark themselves. They don't know what to do or what it's all about.

"I've got six children and my wife. Also my father and mother. To go outside you have to have a certain kind of home. If they want me to go out the least they can do is to give me some kind of housing and say, 'Now, will you take this?' Instead, they are saying, 'America's going to help you. So you go out and do what you can.' That's not dependable. We want some assurance if we're to go out. By staying here, I'll have a roof over my children's heads and enough to eat, although I don't like the food.

"When the Army came out to ask us to make this decision I told the Colonel, 'If you set a deadline, I will renounce my citizenship due to the fact that I have no place to go.' "

On January 9 another Nisei informant stated:

"Under the international agreement, they can't kick the aliens out of camp. That's the reason that so many people are renouncing their citizenship."

Meanwhile, a number of informants who, in my opinion, were influenced by newspaper reports describing the statements made by certain residents of California, told me of rumors which were being

circulated in the Center.

On January 13, a Nisei stated:

"California is the last place I'd want to go back to with all I've been reading. They say the Army will back us up. But that's only against mob violence and not against what an individual might do. If some person beats us up, we can't do anything about it."

On January 12, another Nisei stated:

"People are saying that some Japanese were killed around Stockton (California). Reading the papers and considering all other facts, the people have a feeling of not wanting to return to the Pacific Coast."

On January 14, another Nisei stated:

"What do they want us to do? Go back to California and get filled full of lead? I'm going to sit here and watch."

On January 15, another Nisei stated:

"Rumor is being circulated that five Japanese were killed in Fresno (California)."

Such rumors and the sentiments which they engendered endured for many months. On May 8, 1945, a Nisei informant stated:

"Yeah, you're free all right if you go out. You've got civil rights. Civil rights to be dynamited! Civil rights to have your head cut off! They're even trying to take poor Doi's land away from him now."

This informant's sister, who was present, tried to calm him, and explained to me: "If they had made an example of those soldiers (who attempted

to dynamite Doi's residence in California) it would have helped."

On January 24 Mr. Burling released a letter written on behalf of the Attorney General condemning the activities of the Resegregation Group, stating that they "are intolerable" and that they "will cease." One informant criticized the letter as "sarcastic." One Nisei, who had some legal training but, to the best of my knowledge, had no connection with the Resegregation Group or the Young Men's Fatherland Group, remarked:

"The Department of Justice is not sincere. They are hounding people with a childish mentality and making them act like kids. . . . They've got you behind the eight ball once you renounce.

"The way these hearings were conducted it seems as if Burling had the final say of whether to accept a renunciation or not. The law states that it is the Attorney General who had the final say. As I see it, it's a frameup. I'd hate to live in this country if Burling was Attorney General."

Other informants, however, appeared to be distinctly pleased at the verbal castigation the Resegregation Groups had received:

On January 27, an informant stated:

"Confidentially speaking . . . I think he's got brains in his head. Many of the people think he did the right thing. . . . The Department of Justice really meant business. The people were kind of happy."

On January 31, another informant stated:

"It sure disgraced many of them (Resegregationists). If they had shame enough, they wouldn't have the face to come out with. We all agreed that that ought to have put a stop to it. But it seems it didn't."

On February 8, another informant stated:

"It was time somebody told them off! . . . After all, this is American soil."

On the same day, another informant stated:

"The people thought, 'That's telling them!'"

The Resegregation Group and the Young Men's Fatherland Group, however, continued their activities. They also continued to spread propaganda to the effect that internment was a badge of honor, that internment made one a "true Japanese," and that their group was shortly to be placed "safely" in a Center under the Department of Justice, while all other residents of Tule Lake would be forced to relocate.

On January 29, 1945, a statement by Mr. Dillon Myer was released in the project newspaper that "those who do not wish to leave the (Tule Lake) Center are not required to do so and may continue to live here or at some similar center until January 1, 1946." My data indicate that this statement did not reassure the residents. Instead, it is my considered opinion that the six weeks of tension, fear, and extreme insecurity brought about in part by the residents' interpretations of Administrative policies and the Army hearings and, in part, by the internments and the rumors circulated after the

internments had, by the end of January 1945, brought the residents to a state bordering on panic. The phenomena of mass hysteria are to so great an extent marked by lack of logic that they are difficult to describe in a document of this nature. I shall offer the following statements made by informants between January 26, 1945, the date of the second internment, until the end of February 1945. On the basis of my intensive study of the situation, I affirm that to the best of my knowledge and belief, these are not the statements of a few atypical individuals but that they are a rather mild representation of the state of mind of the substantial majority of the residents. I also affirm that to the best of my knowledge and belief in these specific statements my informants were telling me the truth, except when they state that the members of the Young Men's Fatherland Group were glad to be interned. Here, a closer approach to the truth would be, "They say they are glad to be interned."

On January 29, a Nisei girl told me:

"The Hokoku group (Young Men's Fatherland Group) were all glad to get sent to Santa Fe. They have this one feeling that now their status is sure about the draft."

On January 30, an Issei informant told me:

"Most people are glad those radicals were picked up . . . but the radicals are still stubborn so we better keep quiet. If I should say what I think in public they (Resegregationists) would say, 'Beat him up!'"

On February 1 a Kibei informant told me that the Young Men's Fatherland Group was going about the camp asking for signatures which would indicate that members were still loyal to the organization. He said, "Those who refuse to sign they call 'dog.' " He added that a friend of his who had been scheduled for internment and then released feared physical violence from members of the Resegregation Group because he had not gone to Santa Fe. "Mr. Doi came to stay here (at the informant's apartment) at first, but I told him to go back to block 59. That's what a man has to do."

The Kibei's wife added:

"Gee, I hope the day will come when we can go to the laundry and wash our clothes and not have the Hokoku people glaring at us."

On February 8, a Nisei woman stated:

"When the so-and-so Hokoku go (to internment) we can't go and say, 'We're sorry your son was taken away.' You have to congratulate them!

"I heard some of them (Resegregationists) complimenting a family whose son was sent. They say they are true Japanese. The man said, 'Next trip it will be my son.' They (Resegregationists) are just tickled pink.

"A week ago my husband met a friend who had a bozu hair cut (shaved head). He said, 'What, are you bozu, too?' 'Sh-h-h,' the friend said, 'This is camouflage. Otherwise nobody in my block will talk to me.' . . . I hear that in block 74 there are two girls who refused to become members of the

(Resegregationists) girl's organization. All the other girls won't speak to them now."

On February 13, a Kibei informant stated:

"In the minds of the people of the Center has been the general impression that by going to Santa Fe they'll be recognized as aliens and they feel that their renunciation of citizenship is granted. Whereas if you are a gentleman enough to be peaceful and quiet, renunciation will not materialize."

On February 16, a Kibei girl told me:

"Many of the parents are trying to make their sons join the Hokoku (Young Men's Fatherland Group). This is especially in the Manzanar section. One boy has a duck cut and wears zoot suit clothes. His parents are trying to make him join the Hokoku. He says, 'Golly, I can't do that. How would I look in Santa Fe?'"

On February 28, a Nisei girl stated:

"I know some poor kids, their parents made them shave their heads. . . . But they still roll up their jeans to show their Argyle socks (Argyle socks were, evidently, the height of style for adolescent Nisei). A lot of kids say that when they're 18 they'll have to join the Hokoku due to their parents' pressure and the draft."

On February 28, my most reliable informant, a very blunt man, stated:

"Many Issei and families are forcing their sons to join the Hokoku-dan merely to escape the draft. I told them, when they get back to Japan they will use some means to keep their sons out of the Japa-

nese Army. They were surprised to hear me say that.”

In my opinion anxiety and panic reached a peak in mid-February, immediately after the internment of February 11, when most of the members of the Young Men's Fatherland Group were removed from the Center. I was assured by several informants that the remaining Resegregationists on February 12 had held a great rally in the Manzanar section. At this rally, it was reported, the people had been told that all citizens who were not members of the Young Men's Fatherland Group (which, of course, implied renunciation of citizenship) would be drafted by March 1. (At this time most renunciants who were not members of the Young Men's Fatherland Group had not yet received official notices that their renunciations were accepted by the Attorney General.) I cannot affirm that such a meeting was held or that such statements were made. On February 13, however, I received a letter from a Kibei (dated February 12), part of which follows:

“The condition in the center has been most unsettled because of recent mass pick-ups (internments). The current rumor which in my opinion is the most vicious has it that unless people (young men, of course) sign up with the organization, they will be subject to draft by March of this year. There seems to be a great increase in the membership of said body. The people are under the impression that if you are a member, then your chance of renunciation is guaranteed whereas, if you are not, just just

don't know when you will be able to renounce your citizenship. . . . The result if left unabated, will not only be tragic but dreadful. I don't know what you are able to do, but for justice's sake please take some action."

On February 13 I consulted my most reliable informant, an older Nisei, and asked him about these rumors. He stated:

"Those rumors are being heard about the camp. It has a tremendous effect. People are joining the Hokoku. It's going over like wildfire.

"The people are in a quandary and don't know what to do. They just follow the mob. I told people who came to me to ask for advice, 'You are like a bunch of sheep.'

"I gave those parents hell for being so jittering and not having a mind of their own. Renunciation is the only idea. Parents want their sons and daughters to renounce so they can go to Japan with them. It's fantastic in a way. . . .

"The trouble with most of the Japanese in this camp or in any other camp is that their mind is not made up. They swing from one side to the other. They will fluctuate."

On February 19, a Nisei girl stated:

"A week ago the people were in hysterics. . . . They were so excited. They said, 'The draft papers are right there . . . they'll draft us all over camp.'"

On February 13, a well educated and intelligent informant remarked:

"Sociologically speaking, I wonder if the people

have not been tortured in their minds for so long—all they can think of is what's happening right in front of their eyes and they aren't looking forward to the future at all. None of them think of the fact that the war might end and then what position would they be in?"

When March 1 passed and no residents were drafted the acute excitement slowly abated. It was not until March 16, however, that the WRA announced to the residents that those activities in which Resegregationists had taken part, e.g., parades, drilling, bugling, were unlawful and prohibited.

I received relatively little information from informants on how the renunciation hearings were conducted. Several informants commented on the short time the hearings took; two mentioned that they had been treated courteously. One informant stated that an acquaintance who had had a hearing regretted that he felt obliged to make derogatory statements about the United States in order to make sure that he would be granted renunciation. No informant stated or implied that any kind of duress was exerted at the hearings by the hearing officers of the Department of Justice. It is, however, my opinion and belief, that a great many citizens made false statements at their hearings, regarding their loyalty to Japan and to the Japanese emperor.

Much has been said in this document about persons who renounced their citizenship and almost nothing about those who did not. Undoubtedly, the

substantial majority of persons who did not renounce their citizenship did so because their ties to the United States were so strong that they were able to resist the extraordinary sociological and psychological pressures which were brought to bear upon them. It is of interest, however, that, in my opinion, the most courageous and open adherents of non-renunciation were a group of young men who were alleged to be gamblers. These young men on two occasions openly defied the Young Men's Fatherland Group, which had publicly stigmatized them as "gamblers" and "sake-drinkers."

On December 15, 1944 a group of about a dozen of these alleged gamblers entered the block where the Young Men's Fatherland Group had its headquarters. One of the young men challenged the male secretary of the Resegregation Group and the two men fought with a mop and a piece of wood, while the other so-called gamblers stood about and held off a crowd of angry Resegregationists. The non-Resegregationist was victorious and after the fight he addressed the crowd, denouncing the Resegregationists as "ruining the young men in the Center." The leaders of the Resegregation Group, in my presence, voiced threats of extreme physical violence against this group of alleged gamblers but did not carry out the threats, since the issue was subordinated by the excitement which followed the internment of December 27, 1944.

I was well acquainted with a number of these alleged gamblers and, as far as I know, they did not

renounce their citizenship. Their open defiance of the Resegregation Group was, in my opinion, intimately related to the fact that even though they were greatly outnumbered, they were, by the late fall of 1944, the only group in the Center which possessed the organization and man-power to risk physical combat with the Young Men's Fatherland Group. In regard to the fact that they did not renounce their citizenship, it is my opinion that they were hard-headed realists. On February 5, 1945, when many of my other informants were in a state of extreme anxiety fearing that their applications for renunciation would not be accepted, I had a long interview with members of this alleged gambling clique. They discussed the renunciation with comparative calm. One stated:

"After all, as I see it, my American citizenship isn't anymore good to me than a roll of toilet paper right now. In fact, it's less good. But I was born with it and I'm not going to give it up. It might come in handy later."

Summary of the Motivations Which Led to Renunciation of Citizenship

As a student of anthropology and sociology I view the phenomena relevant to the renunciation of citizenship as a cumulative process which may be traced back to the evacuation. In the spring of 1942 citizens of the United States were removed from their homes and confined in relatively unpleasant surroundings under Military guard. Over a thou-

sand Nisei who later renounced their citizenship were between the ages of 14 and 18 years of age when they were evacuated. In the fall of 1943 over 6,000 citizens were segregated to the Tule Lake Center and stigmatized as disloyal to the United States. Certain of the factors which motivated these persons to become segragees have been stated on pp. 7-8 of this document. There were, however, a substantial number of citizens who were taken to or remained in Tule Lake who, at the time of segregation and after segregation, held status as loyal citizens of the United States. To affirm that residence in the Tule Lake Center did not contribute to the development of confidence in the United States, to a sense of security in regard to the intentions of the United States, or to a realization of the rights and responsibilities of American citizenship, is, in my opinion, a distinct understatement. From the early months of 1944, the Resegregation Group, whose leaders affirmed a fanatic loyalty to Japan, was permitted to propagandize the residents of the Center. In August of 1944 this organization made a deliberate attempt to draw American citizens residing in the Center into an auxiliary organization, the Young Men's Fatherland Group, which among its other aims listed the renunciation of American Citizenship. Numerous speeches of an extreme Japanese nationalistic character were delivered to the young men. They were urged to participate in militaristic exercises. In addition, the Resegregation Group had within its body a group of terrorists

who repeatedly assaulted residents who criticized their policies and activities. Only one of these assailants, to my knowledge, was apprehended and punished. Furthermore, up until December of 1944 no authority at any time substantially attempted to discourage the Resegregation Group. Not until January of 1945 was the group formally reprovved by the Department of Justice and not until March of 1945 did the WRA announce that the activities of this group were illegal and prohibited.

In addition to the influences described above, the residents of Tule Lake for almost four years had been subjected to the demoralizing effect of life in the Centers. They had suffered endless annoyances and irritations, which were all the more grievous because they were thought to be unjustified. They had been stigmatized by the press as rioters. Certain grave brutalities were said to have been committed upon Japanese young men by the WRA Internal Security on the night of November 4, 1943. (I have not included these specific data in this document, though I have statements from young men who said they were beaten and statements from a doctor and a nurses aide who attended them.) The residents, for a long period, had almost no opportunity for recreation and many who desired work could not be given employment. They had almost no contact with any friendly American of Caucasian ancestry. Their country, they thought, had cast them off and considered them "disloyal." In short, for almost four years, their experiences had been of

a nature calculated to make them lose faith in America and blight their conception of the value of American citizenship.

Despite these experiences, I affirm, that to the best of my knowledge and belief, the very substantial majority of the citizen residents of Tule Lake in November of 1944 did not welcome the opportunity to renounce their citizenship. I affirm that to the best of my knowledge and belief they were markedly un-enthusiastic. I affirm that the very substantial majority of residents in Tule Lake had resisted the frenzied efforts of the pro-Japanese groups to force them to participate in pro-Japanese activities. I affirm that some individuals, who, in my opinion, possessed great moral and physical courage, spoke against these pro-Japanese activities and were brutally assaulted. I affirm that some rash youths still dared to wear their hair in a duck cut and that many young people still passionately desired to relocate when they could obtain the permission of their parents. With a full realization of the gravity of my statement, I, who knew these residents better than any other non-Japanese, affirm that to the best of my knowledge and belief, the substantial majority of citizen residents of Tule Lake, despite their detention and despite the extraordinary pressures to which they had been subjected, were capable of re-assuming the duties and responsibilities of American citizenship.

It is for the reason stated above, that the events which followed the lifting of the exclusion order,

are, in my opinion, peculiarly tragic. I have, I believe, made it clear that the residents of Tule Lake, owing to the statements made by the WRA, their interpretation of questions asked at the Army hearings, the internments, the rumors which followed the internments, and the irrational state of mind which accompanies long detention and isolation, tension, and insecurity, were thrown into a state of panic. Most of them may be compared to a crowd of persons who believe that they are about to be bombed, rush to shelters, and find there officials whose statements they interpret as "Renounce your citizenship or you cannot enter." Fear of grave economic hardship, fear of physical violence from hostile citizens of Caucasian ancestry, fear of family separation, the fear that non-renunciants would be drafted, to which were added tremendous parental and familial pressures based on these fears were the major motivations of renunciation. During the months of March, April, and May of 1945, the families of internees continued to boast of their impending "safety" and to taunt non-members and persons who had not renounced their citizenship with the imminence of involuntary relocation.

At the time of this panic I was convinced—and I so stated to the hearing officers of the Department of Justice—that the great majority of residents were not renouncing their citizenship out of loyalty to Japan. I was also convinced that very many of the residents did not appreciate the gravity of their act and later would attempt to get their citizenship

back. Many residents assured me, I believe in all sincerity, that renunciation was like the Military Questionnaire and the Segregation, i.e., they could change their minds. Some assured me that their hearings before the hearing officers of the Department of Justice were brief and therefore they were sure that later on they would be given a longer and more thorough hearing. This was, in short, not the first time that they had been given a hearing which they were assured was very grave and which, later on, had signified little. Indeed, at the time of segregation they were assured by the WRA that they would be allowed to remain in the Center until the end of the war.

In my opinion, the threat of immediate physical violence from Japanese residents was a relatively minor motivation toward renunciation of citizenship. I was told frequently that the leaders of the Young Men's Fatherland Group had forced people to renounce their citizenship. I have no evidence, however, that the force referred to implied physical violence. It is my opinion that members of the Young Men's Fatherland Group who refused to renounce their citizenship stood in danger of physical violence and were aware of this. Certain individuals who lived in blocks where many Resegregationists also resided may well have been threatened with violence if they did not renounce even though they were not members of the Resegregation Group. During my residence in the Center, I collected no specific data that such threats were made.

During my residence in the Center no Japanese resident stated or implied that the hearing officers of the Department of Justice or any member of the WRA administrative staff employed duress at the renunciation hearings to influence residents of Tule Lake to renounce their citizenship.

/s/ ROSALIE HANKEY.

Subscribed and sworn to before me this 8th day of January, 1947.

[Seal] /s/ EDWARD T. DUFFY,
Notary Public.

My commission expires Oct. 9, 1948.

Receipt of copy of foregoing Affidavit admitted Jan. 23, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 23, 1947.

[Title of District Court and Cause.]

OBJECTION AND EXCEPTIONS TO EVIDENCE,
MOTION TO STRIKE SAME,
AND MOTION TO SUPPRESS EVIDENCE
ILLEGALLY OBTAINED

I.

The plaintiffs, and each of them, hereby object and except to the introduction in evidence herein of the affidavit of Thomas M. Cooley, II, dated Jan. 9, 1947, and annexed to the supplemental brief of defendants filed herein on Jan. 27, 1947, and to the

affidavit of Rosalie Hankey dated Jan. 8, 1947, and filed herein on Jan. 23, 1947, to each and every part thereof, and object and except to any consideration and weight whatever being thereto by the court on the pending motions of plaintiffs for summary judgment, for judgment on the pleadings and to strike, and move to strike the same for each and all of the following reasons and upon each and all of the following grounds, to-wit:

The same does not constitute the best evidence but is secondary evidence for which no foundation whatever has been laid; the same constitutes self-serving declarations; the same is composed of opinions and conclusions of the affiant and is hearsay; the same is vague, indefinite and uncertain; the same has no bearing on any issue herein; the same is an attempt to alter or vary the terms of written instruments by parole evidence; the same is in conflict with admitted facts and with facts which the defendants are estopped to deny and with facts of which the court takes judicial cognizance; the same relates to matters neither seen nor heard by nor within the personal knowledge of affiant; the same has no bearing upon any material issue involved herein; the same is not binding upon the plaintiffs or any of them; the same is sham; the same is vague, indefinite, uncertain and ambiguous; and the same is incompetent, irrelevant and immaterial;

II.

And plaintiffs and each of them object, except to and move to strike the affidavit of Thomas M. Cooley, II, dated January 6, 1947, filed herein on Jan. 9, 1947, and copy thereof annexed to the supplemental brief for defendants containing a letter signed by O. P. Echols with an attached letter signed by J. M. Ebbitt, for each and all of the reasons and upon each and all of the grounds specified in paragraph No. I hereinabove and also upon the further ground that no opportunity, privilege or right of subjecting said J. M. Ebbitt, the signer of said attached letter dated 25 November 1946 addressed to the Adjutant General, to cross-examination on the matter therein contained exists or can be had by virtue of the fact that he is outside the jurisdiction of this court and country and is in Japan, to-wit conquered territory now under the dominion and control of the Allied Powers and General Douglas MacArthur and, therefore, cannot be subpoenaed or produced by plaintiffs for cross-examination on his qualifications as an expert in the Japanese language or as an expert on Japanese law or the purported statements of law contained therein; and upon the further grounds that the law of Japan has no extraterritorial effect and cannot affect any citizen of the United States or any resident of the United States; that said affidavit and its contents are barred by the provisions of Title 8 USCA, sec. 800, and are inconsistent with the grant of citizenship by the 14th Amendment and hence inadmissible in evidence.

III.

(Motion To Suppress)

And plaintiffs and each of them move the court to suppress and to strike the affidavit of Thomas M. Cooley, II, mentioned in paragraph I hereinabove upon the additional ground that the same purports to be a summary of purported statements made by certain plaintiffs and other persons which said statements were exacted and obtained from them illegally and unlawfully through the instrumentality of duress, coercion, undue influence and fraud exerted upon them and the duress in which they, at the time thereof, were held by the defendants and agents of the government and sundry pressure groups of persons operating in the concentration camps where they were falsely and illegally imprisoned by the government and its agents, all in violation of the provisions against illegal search and seizure guaranteed by the 4th Amendment, the due process clause of the 5th Amendment and the provision of the 5th Amendment against compelling any plaintiff to be a witness against himself.

Attention is directed to the fact that at the time said purported statements are purported to have been made each plaintiff was a citizen of the United States who had been falsely arrested and then and there was illegally held in a concentration camp, subject to the duress complained of in the amended complaint herein, for an unspecified crime without any charge or charges having been filed

against him and without any hearing having been accorded him as provided for by the 6th Amendment and the due process clause of the 5th and said statements so exacted from plaintiffs were not voluntary but were coerced and the said statements were and are false and inadmissible by reason thereof.

The above and foregoing objections and exceptions to the introduction of said affidavits and their contents in evidence on the pending motions herein and motion to strike and to suppress are herewith submitted.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

Receipt of a copy of the above Objections and Exceptions To Evidence, Motion To Strike and To Suppress is hereby admitted this 29th day of January, 1947, for submission to the court on the pending motions for judgment on the pleadings, for summary judgment and to strike.

TOM C. CLARK,

Attorney General.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney.

Attorneys for Defendants.

[Endorsed]: Filed Jan. 29, 1947.

District Court of the United States, Northern
District of California, Southern Division

No. 25294 Consolidated
(Nos. 25294, 25295, 25296, 25297)

TADAYASU ABO, et al.,

vs.

TOM CLARK, et al.,

CONSENT AND ORDER
REASSIGNING CASE

I consent to the above-entitled case being reas-
signed to me for all further proceedings.

Dated Feb. 20, 1947.

/s/ LOUIS GOODMAN,

Judge.

Good cause appearing therefor and the under-
signed consenting thereto the above consolidated
cases heretofore submitted to Hon. A. F. St. Sure,
United States District Judge, are hereby ordered
transferred and submitted to Hon. Louis E. Good-
man, United States District Judge for all further
proceedings therein.

Dated: February 20, 1947.

/s/ MICHAEL J. ROCHE,

/s/ LOUIS GOODMAN,

/s/ GEORGE B. HARRIS,

U. S. District Judges.

[Endorsed]: Filed Feb. 20, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF THOMAS M. COOLEY, II.

District of Columbia—ss.

Thomas M. Cooley, II, being duly sworn, deposes and says:

That he is Director of Alien Enemy Control in the Department of Justice.

That in his said capacity he has control over and personal knowledge of the contents of the files of the said Department relating to the renunciation of citizenship at Tule Lake and elsewhere and to related matters.

That the attached is a true copy of a copy of a letter dated January 12, 1945, written to Dillon S. Myer, Director of the War Relocation Authority in Washington, D. C., by R. R. Best, Project Director of the Tule Lake Center at Newell, California, which reached the Department through official channels.

And that said copy is a part of the permanent records of the Department of Justice.

/s/ THOMAS M. COOLEY, II,
Director Alien Enemy Control
Department of Justice.

Subscribed and sworn to before me this 18th day of March, 1947.

[Seal] /s/ MARY R. McLEAN,
Notary Public.

My Commission Expires Oct. 14, 1951.

(Copy)

United States Department of the Interior
Tule Lake Center, Newell, California

January 12, 1945

Confidential

Airmail

Mr. Dillon S. Myer

Director

War Relocation Authority

Barr Building

Washington, 20, D. C.

Dear Mr. Myer:

There has been an acceleration of applications for renunciation of citizenship and from reports received from numerous sources, independent of each other, it is definitely clear to me that the evacuee citizens of this center are resorting to renunciation as a means of assuring detention, at least for the duration, very much in the same manner as they did in connection with registration and in connection with segregation.

Considerable confusion has resulted from their uncertainty as to their status—that is, the possibility of their having to leave—and to this has been added further confusion by minor conflicts and inconsistencies in information which has been disseminated by WRA. These conflicts, though minor, under abnormal conditions are almost deliberately misconstrued by the evacuees in their frantic and desperate effort to find refuge from the spectre of relocation. The net result, as I have stated before, is the flood of applications for renunciation which

has been continued and accelerated by the irrepressible rumors that renunciation will assure them of detention and protect them against expulsion from this center.

Unfortunately the evacuees are not the only ones who are in need of additional clarifications. For example, we are still trying to determine as a matter of certainty what should be done, insofar as WRA is concerned, respecting the right of evacuee citizens who have applied for renunciation but who are "not designated by name for exclusion", etc., if they wish to leave after January 2, 1945.

Clarification is also needed respecting the right of excludées at this center to leave after January 20, 1945. Public Proclamation No. 21, by the provisions of paragraph 8, rescinds Public Proclamation No. 8, effective midnight, January 20, 1945, and also as of that time and date rescinds Civilian Restrictive Orders No. 18, 19, 20, 23, 24, and 30, "except as to those persons who have been designated individually for exclusion or other control," etc. Civilian Restrictive Order No. 26 which applies to Tule Lake War Relocation Project Area is not rescinded and therefore remains in full force and effect. What significance does this have since it is issued pursuant to Public Proclamation No. 8 and that Proclamation is rescinded?

It appears that excepting for the failure to rescind Civilian Restrictive Order No. 26, the Tule Lake Project is in the same category as are all other projects, and that the restrictions of Proclamation

No. 8 apply only to those persons who have been or may be designated for exclusion or control. It would therefore seem to follow that all other citizens at this center, no matter what their record or our opinion may be, are free to leave after midnight, January 20, 1945.

From the scraps of information which we have so far obtained from the army and from an examination of the white, or cleared list, it seems likely that some of the most pro-Japanese in the center will not be individually designated by the army at all. Assuming this to be so and if our understanding that all citizens not individually designated are free to leave the center after midnight January 20, 1945, responsibility should be clearly allocated as between the army and WRA. If, however, some persons not individually designated are not free to go after January 20, who is to detain them and under what authority? This discussion does not exhaust the perplex ties but highlights the legal and practical difficulty which we foresee. In honesty, I will state that neither I nor my staff clearly understand the situation and as a result our efforts to explain it to the evacuees, together with statements issued from Washington, by the army, and appearing in the public press, have resulted in the greatest confusion in the colony. The central theme of evacuee thought at the present time is focused not on how to leave the center, but on how to remain in it. Most of the adult evacuees have given negative loyalty answers or have otherwise placed them-

selves in a position making war-time relocation extremely difficult. They have become emotionally conditioned to accepting the promise previously extended to them here that this camp would remain open to them as a haven during the War. They now see themselves faced with the choice of having the camp closed and being forced to relocate or in someways persuading some agency of the Government that they are dangerous and they must be detained. At the present time the evacuees hope to persuade the Department of Justice to intern them either here or in Santa Fe by renouncing their citizenship. If the Department of Justice should refuse to shelter them, notwithstanding renunciation, more drastic and possibly violent measures may be resorted to, to insure detention. Thus, in my opinion, the policy of forced relocation from this center at the present time will not succeed in relocating any significant number of persons but at best will force the evacuees to renounce their citizenship and, worse, might lead to an incident.

The seriousness of the situation in which many citizens are being led to renounce their citizenship solely for the protection against having to relocate warrants, in my opinion, a clear and unqualified announcement that no resident will be forced either directly or indirectly out of this center for the duration of the war, and either this center or a similar center will be available to the present residents of Tule Lake on a voluntary basis whether or not they renounce their citizenship. I have dis-

cussed this problem at length with members of my staff and they concur in my opinion that it would very likely prevent a situation such as that which followed segregation and registration.

Mr. Burling of the Department of Justice who, as you know, is here conducting renunciaiton of citizenship hearings, has approached me and has expressed grave concern over the enormous increase in the number of applications for renunciation over the figure anticipated. He independently expressed the view that this increase is, to an important extent, caused by the apparent application of the policy of forced relocation to this center. He has pointed out that under the act, it is almost impossible for him to stop the wave of renunciation of citizenship. I understand that he feels, therefore, that the Department of Justice has an interest in urging the abandonment of the policy of relocation at this particular center and that he has made a report to that effect to his superiors in Washington.

Because of the fact that once applications for renunciation are made, the processing always goes through to its conclusion, and because of the speed with which center morale is deteriorating and with which undesirable attitudes are crystalizing, I recommend that the underlying policy again be considered at the earliest possible moment.

Sincerely,

R. R. BEST,

Project Director.

[Endorsed]: Filed Mar. 24, 1947.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25294-G Cons. No. 25294-G

TADAYASU ABO, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc., et al.,

Defendants.

STIPULATION

It is stipulated between the parties hereto that this case be submitted for decision to the Court on the cause, that is, on the merits and the present record as it stands, including any evidence by way of affidavits and exhibits submitted on the respective motions for summary judgment and for judgment on the pleadings that is legally admissible as competent, relevant and material evidence against the objections and exceptions made thereto and against the motion made to suppress the same, and that the proofs be closed provided, however, that if the Court deems it necessary for a proper decision of any factual or legal issue or issues involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon and, in such an event, the parties hereto shall have the same rights in respect to the introduction of such further or addi-

tional evidence as to any such plaintiff or plaintiffs as they would have had if they had not entered into this stipulation.

Dated: October 10, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

So Ordered, Oct. 10, 1947.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Oct. 13, 1947.

[Title of District Court and Cause.]

STIPULATION AND ORDER CORRECTING
NAMES OF PARTIES

It is stipulated that the name of Shigetoshi Obata who was joined herein as a minor party plaintiff by order of court on August 25, 1947, be amended and corrected to read Shigetoshi Ohata, and that the names of Kazumi Hamano and Shizuo Hamano who were joined herein as parties plaintiff by order of court on August 25, 1947, be amended and corrected to read Kazumi Hanano and Shizuo Hanano respectively.

Dated: October 10, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Defendants.

So Ordered: October 10, 1947.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Oct. 13, 1947.

In the United States District Court for the Northern
District of California, Southern Division

No. 25294-G (Consolidated No. 25294-G)

TADAYASU ABO, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc., et al.,

Defendants.

No. 25295-G (Consolidated No. 25294-G)

MARY KANAME FURUYA, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc., et al.,

Defendants.

WAYNE M. COLLINS,
Attorney for Plaintiffs.

FRANK J. HENNESSY,
United States Attorney.
Attorney for Defendants.

Goodman, District Judge.

OPINION

Plaintiffs are approximately 2300 out of 5371 native born persons of Japanese ancestry, who signed renunciations of their American citizenship in 1945, pursuant to 8 USC 801(i), while they were interned and imprisoned at Tule Lake Relocation Center in Modoc, California. These plaintiffs, by their amended complaint, seek a decree in equity

rescinding their renunciations and declaring that they are still citizens and nationals of the United States. The issue tendered is without precedent and unique in the annals of American jurisprudence.

Of the 2300 plaintiffs, about 264 were heretofore ordered deported as alien enemies. Some were subsequently voluntarily released by the Department of Justice. In actions 25296 and 25297, this court heretofore granted writs of habeas corpus, by which the remainder of the 264 referred to were released from the custody of the Immigration Authorities who were about to deport them to Japan. The Immigration Authorities claimed the right to deport these persons upon the ground that they became alien enemies, i.e. citizens of Japan, as a result of their renunciation of American citizenship. The reasons for the issuance of the writs of habeas corpus in these cases are set forth in my opinion, 76 Fed. Supp. 664.

In the instant causes, the renunciations are alleged to be void and ineffectual for the following reasons:

I. The renunciants acted (a) under pressure of duress and coercion induced by actions of the United States Government and by factions of disloyal co-internees, and (b) while in a state of mind, brought about by their evacuation and internment experience, rendering them impotent to act freely and voluntarily or competently and intelligently.

II. The renunciation hearings were unfairly conducted and were lacking in procedural due process.

III. 8 USC 801(i) is unconstitutional.

It is also alleged that some of the renunciants were infants and insane persons.

The answer of defendants denies that plaintiffs were coerced or caused by duress to renounce their citizenship and avers that the renunciations were free and voluntary. Denial is also made of the charge of unconstitutionality of the renunciation statute and of unfairness of the renunciation hearings.

The answer does admit the following:

Detention of renunciants in a war relocation center surrounded by wire and guarded; existence of hostility to renunciants in various parts of the country which caused them apprehension at relocation; existence at Tule Lake of pro-Japanese organizations which engaged in propaganda programs and misrepresentations to persuade citizen internees to renounce their American citizenship; parental pressure exercised by alien parents upon their citizen children to induce them to renounce for the preservation of the family unit, and to avoid induction into the armed forces.

The answer also alleges that certain of the plaintiffs were themselves members of the nationalistic Japanese organizations above referred to.

After the cause was at issue, both plaintiffs and

defendants moved for summary judgment upon affidavits and documents filed. The documents consist of public records issued by the War Relocation Authority on the subject of Japanese Evacuation and Relocation, records of hearings held in February and March of 1942 before a House Committee Investigating National Defense Migration, and a book entitled "The Spoilage" dealing with Japanese American evacuation and resettlement.

The plaintiffs also moved for judgment on the pleadings. In addition, motions to strike portions of the pleadings were filed by both sides. Plaintiffs also moved to strike certain of defendants' affidavits.

Then on October 13, 1947, a stipulation was entered submitting the cause on the merits, upon the record as it stands including any evidence by way of affidavits and exhibits submitted on the motions previously made that are legally admissible as competent, relevant and material against the objections made thereto; provided, however, that if the court desired further evidence in respect to any particular person, it may so order.

Certain of the affidavits making up the record are based upon facts ascertained from personal observation by individuals who appear to be unbiased. They are as follows:

Submitted by plaintiffs:

1. Tetsujiro Nakamura.
2. Masami Sasaki.
3. Rev. Thomas W. Grub.

Submitted by defendants:

1. John L. Burling.
2. Rosalie Hankey.
3. Thomas M. Cooley II, dated March 18, 1947
filed March 24, 1947.
4. Thomas M. Cooley II, dated January 9, 1947,
filed January 27, 1947.

The documentary evidence proffered is voluminous and is corroborative and cumulative of matters contained in the affidavits. For these reasons and also because it is not the best evidence, the court has not considered the so-called documentary evidence. Neither has the Court considered the so-called Abe Fortas letter, since it was stricken out on preliminary motion.¹

In my opinion decision of the causes should be

¹This letter, pleaded again in the amended complaint, is the subject of defendants' motion to strike. The letter is also attached as an exhibit to the affidavit of Ernest Besig. It is a communication from the Under Secretary of the Interior in charge of the War Relocation Authority to Mr. Besig as head of the American Civil Liberties Union in Northern California, sent in August 1945. In this communication is an explanation of the reason for certain regulations adopted at Tule Lake. The explanation given tends to confirm the plaintiffs contention that the primary factor which induced renunciation of citizenship by the plaintiffs herein was pressure exerted by the pro-Japanese groups at the Camp.

made without determining the alleged unconstitutionality of the renunciation statute.² The claim of the plaintiffs, that the so-called renunciation hearings were unfair, is unmeritorious, inasmuch as 8 USC 801(i) required no hearings at all.

A study of the affidavits reveals that some renunciants acted freely and voluntarily. However, these are not the renunciants who are here seeking restoration of citizenship. Those who did act freely were members of the pro-Japanese organizations at Tule Lake, who have already been repatriated to Japan in accordance with their express wishes.

To recite in detail the circumstances existing at Tule Lake Camp at the time the renunciations were executed, as well as the prior history of conditions there, would be to write a story more appropriate for a book or similar literary effort. It is sufficient to say that the affidavits of both sides show agreement as to the combination of factors which lead to the execution of the renunciations. What disagreement there is concerns which factors were primary, and which subordinate, as to their effect and impact upon the plaintiffs. These factors were:

²The wisdom of abstaining from deciding Constitutional questions unless required to do so by the record of a particular case, has long been judicially recognized. *Baker v. Grice*, 169 U. S. 284; *Arkansas Oil Co. v. Muslow*, 304 U. S. 197; *Alma Motor Co. v. Timkin-Detroit Axle Co.*, 329 U. S. 129 (1946); *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947); *Hurd v. Hodge* (October 1947 Term U. S. Supreme Court, Nos. 290 & 291, decided May 3, 1948.)

1. The internal pressure to renounce (by indoctrination of young and threats of violence against recalcitrant internees and their families) exerted by the two pro-Japanese factions at Tule Lake who were permitted to carry out nationalistic activities.

2. Parental pressure by alien parents on citizen children to prevent family breakup and avoid draft induction.

3. The fear of community hostility on release, leading to resort to renunciation in the belief it would assure further detention.

4. The conviction that the government would deport them in any event and, unless they renounced, they would be subject to reprisals on arrival in Japan.

5. Mass hysteria, the outgrowth of the combined experience of evacuation, loss of home, isolation from outside communication and concentration in an enclosed, guarded, overpopulated camp with little occupation, inadequate and uncomfortable living accommodations, dreary and unhealthful surroundings and climatic conditions,—producing neuroses built on fear, anxiety, resentment, uncertainty, hopelessness and despair of eventual rehabilitation.³ I am satisfied that such factors, singly

³It must be kept in mind that Tule Lake was a center purposed not for relocation but for segregation, for the duration of hostilities. In this camp were detained without separation: (1) disloyal alien Japanese; (2) American citizens of Japanese an-

or in combination, cast the taint of incompetency upon any act of renunciation made under their influence by American citizens interned without Constitutional sanction, as were the plaintiffs.

United States v. Kuwabara, 56 Fed. Supp. 716 decided July 22, 1944, was, in a manner of speaking, a "curtain raiser" to this proceeding. The United States Grand Jury for the Northern Division of the Northern District of California, on July 13, 1944, indicted 26 young American citizens of Japanese ancestry, then imprisoned at Tule Lake, for failing to report for pre-induction physical examination pursuant to the Selective Training and Service Act, 50 USC App. § 311. While I was holding the Eureka term of the court later that month, the United States Marshal brought these 26 young men to Eureka for arraignment. I appointed two leading attorneys to represent the defendants. Motions to quash the indictments were presented and were granted. In my opinion, I said: "It is shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint be compelled to serve in the armed forces or be prosecuted for not yielding to such compulsion . . . defendant is under the circumstances not a free agent, nor is any plea that he

cestry who were regarded by Executive Officers of the Government as disloyal; and (3) American citizens of Japanese ancestry whose loyalty had not been questioned but who chose to remain at Tule Lake in preference to further removal to a relocation Center or because of reluctance to leave family members.

may make, free or voluntary, and hence he is not accorded 'due process' in this proceeding." U. S. v. Kuwabara, *supra*, p. 719. I was subsequently advised that the Attorney General directed the United States Attorney not to appeal. The criminal proceedings consequently terminated.

It is true that the Constitutional safeguards in criminal proceedings, such as were taken in Kuwabara, may seem more important and vital than in civil proceedings. But they are of equal importance and vitality. It is only because their violation in prosecutions for crime so greatly offends the sense of justice that the safeguards themselves assume seemingly greater significance in criminal than in civil proceedings. Certainly the loss of American citizenship, described as "the highest hope of civilized man" (U. S. v. Schneiderman, 320 U. S. 118), calls for the exercise of the most inflexible caution upon the part of the Government officials having the power to effectively take away "this priceless benefit." (U. S. v. Schneiderman, *supra*, Justice Murphy.)

Subsection i, of Section 801 of Title VIII USC was added to Section 801 by the Congress on July 1, 1944. In general, section 801 prescribes the "means of losing United States nationality." Subsection i provided an additional means, namely, the loss of United States nationality by resident nationals by filing a written renunciation "whenever the United States shall be in a state of war." It is admitted by the Department of Justice that sub-

section i was drawn by the Attorney General solely as a result of a request to him by the Chairman of the Sub-Committee of the House Select Committee to Investigate Un-American Activities, to recommend to the Committee some solution of the problem arising out of the detention of American citizens at Tule Lake Camp. The Attorney General recognized that there was no constitutional means by which American citizens, not charged with crime and not under martial law could be detained by administrative, military or civil officials or upon a mere administrative determination of loyalty. The Attorney General was thus required to exercise his ingenuity to accomplish the continued detention of the citizen group at Tule Lake Camp without doing violence to the Constitution. His recommendation for the enactment of subsection i was his answer. For by virtue of this legislation, if renunciations of American citizenship could be obtained from those in Tule Lake, it was thought they could then be detained as alien enemies without doing violence to our traditional constitutional safeguards. It is not fair to charge the officers of the Department of Justice with the full responsibility for the effects of Section 801(i).⁴ The People of the United States acting through their representatives in Congress

⁴There was of course no governmental design to entrap the unwilling citizen into renunciation, but merely to afford an opportunity to the willing to renounce. Mass renunciations by distraught citizens were not contemplated.

assembled, as well as the executive and administrative officers of government whose activities contributed to the unfortunate saga of Tule Lake, must all take that responsibility.

The Regulations promulgated by the Attorney General pursuant to the authority granted by Section 801(i), 9 F. R. 12241 make quite clear the statutory object and the purpose of the so-called renunciation hearings.⁵

Congress itself was fully aware of the purpose and objectives of the statute as proposed by the

⁵316.6 Hearing officer's recommendation. The hearing officer shall recommend approval or disapproval by the Attorney General of the applicant's request for approval of the formal written renunciation of nationality. The hearing officer, in making his recommendation, is authorized to consider not only the facts presented at the hearing, but also results of any investigation and any information which may be available to him in reports of Government agencies or bureaus, and from other sources, relating to the applicant's allegiance and relating to the effect of renunciation of nationality upon the interests of national defense. (underlineation supplied.)

316.7 Approval or disapproval by Attorney General. The hearing officer's recommendation and the record of the hearing and any other facts upon which it is based, will be submitted to the Attorney General for his approval or disapproval of the applicant's formal written renunciation of nationality. A renunciation of nationality shall not become effective until an order is issued by the Attorney General approving the renunciation as not contrary to the interests of national defense. (underlineation supplied.)

Attorney General. See House Report 1075 and Senate Report 1029 submitted in connection with H. R. 4102, 78th Congress 2d session.

The safeguards of the Constitution have fallen in earlier days in the face of the hysteria and exigencies of war. It has been stated that: "war stimulates lawlessness" and that "this was true of England during the Napoleonic Wars; it was true of the United States as a result of the World War." (referring to World War I.)⁶

But it is incumbent upon the United States to now effectively and properly correct the evils resulting from ignoring Constitutional safeguards, just as was done in the past.

The court is not unmindful of the heavy responsibilities and burdens resting upon the executive and military officials due to the war with Japan and the dangers particularly affecting the west coast of the United States. But even expediency cannot remove the taint of unfairness with which the renunciations, subsequently executed, were clothed, because of the admitted objective of subsection i.

There rested upon the government the impossible burden, under these conditions, as well as those inherent in the detention of the plaintiffs at Tule Lake, of imparting fairness and regularity to the procedure of alleged renunciations.

⁶"Mr. Justice Holmes and the Supreme Court," Felix Frankfurter, 1938, p. 53.

In accepting the renunciation of the plaintiffs, the Attorney General was, of course, not only fully aware of the purpose of subsection i but also of all of the conditions existing at Tule Lake Camp at the time. The affidavits filed on behalf of the United States in this proceeding fully and without dispute so establish. Only a comparatively small number of renunciants acted with complete freedom of action, as evidenced by their subsequent acts in requesting repatriation followed by actual repatriation to Japan. Only as to this small number, may it be said that there was freedom from the factors which in law made the other renunciations, in the legal and equitable sense, involuntary and invalid.

The affidavit of John L. Burling, assistant to the Director of the Alien Enemy Control Unit of the War Division of the Department of Justice, filed by the Government, is enlightening. Mr. Burling unquestionably was the one officer of the Department of Justice who had the greatest first-hand knowledge concerning conditions at Tule Lake and the setting in which the renunciation hearings were held. Among other things he said: "The Attorney General was then confronted with the necessity of making a recommendation either for the detention of American citizens not charged with crime and not under martial law by an administrative act of a military or civil official or of recommending a means of accomplishing the detention of this group without violating the Constitution." The 48 page affidavit of Mr. Burling is a fair, temperate and

dispassionate statement of the circumstances backgrounding the renunciations. The following excerpts from pages 45 and 46 of his affidavit are indeed worthy of mention in this opinion:

“It is also patent that there was existing at Tule Lake at the time described a very high degree of excitement whipped up by organiaztions admittedly extremely pro-Japanese. It is also true, as has been stated, that most of the renunciations took place at the time when the renunciants and their families were in extreme fear of being forced out of the center into a hostile community and when they believed that the only way of making sure of protective detention during the war was to make themselves eligible for Department of Justice internment. If these factors and the hysteria render the act of renunciation by persons detained under these circumstances void, then the renunciations are void. If the court is now to hold that the totality of the circumstances described in this affidavit constitute coercion, then these renunciations were coerced.”

. . . “It may be said that the hardships inflicted upon these persons were very great and that the hysteria and mental confusion was likewise great.”

. . . “such renunciation could not be set aside as a result of a determination that legal coercion existed but only as an expression of the regret of the American people over the original act of evacuation and detention. If the renunciations are ultimately set aside, in affiant’s opinion, that ulti-

mate decision will only be justified as a determination that the persons of Japanese ancestry resident on the Pacific Coast were so goaded that some of them took the foolish step of renunciation and that, because the moral blame is ultimately elsewhere, these persons shall not suffer the legal consequences of their own acts."

The chronology and history of the military and executive orders providing for the removal and relocation of American citizens of Japanese ancestry, as well as Japanese nationals, is set out in *Ex parte Endo*, 323 U. S. 283 and need not be repeated here. In *Endo v. U. S.* as well as in *Korematsu v. U. S.* 323 U. S. 214 and *Hirabayashi v. U. S.* 320 U. S. 81, the Supreme Court failed to pass upon constitutionality of the detention of these American citizens of Japanese ancestry, beyond the period required for their orderly relocation, a proceeding protested by certain of the justices in dissenting and concurring opinions. In view of the admissions contained in the affidavits filed by defendants herein and the conceded purpose of Section 801(i), I have no doubt that there was a complete lack of constitutional authority for administrative, executive or military officers to detain and imprison American citizens at Tule Lake who were not charged criminally or subject to martial law.

It is contended by the Government that the coercion of the renunciants was not by the Government and that, ergo, there is no basis for cancelling renunciations. But the Government was fully aware

of the coercion by pro-Japanese and by pro-Japanese organizations and the fear, anxiety, hopelessness and despair of the renunciants; and yet accepted the renunciations. Any one of the various factors, the existence of which is admitted by the affidavits, was adequate to produce, at least, a confused state of mind on the part of the renunciants and in which considered decision became impossible. The renunciants acted abnormally because of abnormal conditions not of their own making. We are not here concerned with whether or not the acts of the renunciants detrimentally affected other persons. The authorities cited by defendants, to support the contention that the duress recognized by equity as the basis for rescinding contractual obligations is absent here, are neither persuasive nor pertinent to the unique facts of these causes. There is adequate power in equity to right the wrong done to the plaintiffs—a wrong inherent in the objective of Section 801(i) and demonstrated by the admitted circumstances of renunciation. This judicial power has never been expressly limited nor circumscribed nor has the domain in which it functions been precisely bounded. 30 C.J.S. 387 et seq;

Indeed it is not inappropriate to apply to these causes the rationale of *McNabb v. U. S.* 318 U. S. 332. If a confession secured in a manner obnoxious to Congressional policy may not be used in a criminal case as evidence of guilt, it is equally true that a document relinquishing the priceless insignia of American citizenship should not be validated when executed in like manner.

The language in *Kuwabara*, *supra*, may be appropriately paraphrased to fit this proceeding, viz: "It is shocking to the conscience that an American citizen be confined without authority and then, while so under duress and restraint, for his Government to accept from him a surrender of his constitutional heritage."

The Government of the United States under the stress and necessities of national defense, committed error in accepting the renunciations of the greater number of the plaintiffs herein. The highest standards of public morality and the inexorable requirements of good conscience rest upon the Government in its dealings with its citizens. It must be slow to afflict and quick to make retribution. The Government must be neither reluctant nor evasive in correcting wrongs inflicted upon a citizen. By so doing it demonstrates to the people of the world the fairness and justice of our form of society and law. The Government need not sheepishly confess error; it must be stalwart and forthright in its recognition of injustice. By so doing, faith and confidence in our system of law will be maintained.

Upon the basis of the class showing made by plaintiffs, equity and justice require the entry of an interlocutory decree cancelling the renunciations and declaring plaintiffs to be citizens of the United States.

It may be that if the defendants were to go forward with further proof, they could present

evidence that certain of the plaintiffs individually acted freely and voluntarily despite the present record facts.⁷ Therefore, it is further ordered that defendants may have 90 days from date hereof within which to file a designation of any of the plaintiffs concerning whom they desire to present further evidence. As to any plaintiff, not so designated by the defendants within the time specified, a final decree may enter. As to any plaintiff designated in the manner and within the time specified, further hearings, after notice duly given, will be held.

Dated: April 29th, 1948.

[Endorsed]: Filed April 29, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE DESIGNATION OF PLAINTIFFS CONCERNING WHOM DEFENDANTS DESIRE TO PRESENT FURTHER EVIDENCE

Upon application of Frank J. Hennessy, United States Attorney, and good cause appearing therefor,

It Is Hereby Ordered that the time for the de-

⁷According to the affidavit of Thomas M. Cooley II, dated January 9, 1947, approximately 112 of the plaintiffs were Kibei who spent their formative years in Japan and were said to have been active members of pro-Japanese groups at Tule Lake.

fendants in the above entitled actions to file designation of any plaintiffs concerning whom they desire to present further evidence, as allowed by the Court in its Opinion rendered and filed herein April 29, 1948, be and the same is hereby extended to and including August 28, 1948.

Dated: July 27, 1948.

/s/ LOUIS GOODMAN,

U. S. District Judge.

[Endorsed]: Filed July 27, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING DEFENDANTS' TIME
WITHIN WHICH TO FILE DESIGNATION

Good cause appearing therefor, it is ordered that the time within which the defendants may file a designation of any of the plaintiffs herein against whom they may wish to present further evidence at special hearings herein, which time heretofore was extended by order dated July 27, 1948 to August 28, 1948, be and the same hereby is extended to and including one hundred and twenty (120) days from and after the date an interlocutory order or decree in favor of the plaintiffs and against the defendants is filed by the plaintiffs and is entered herein.

Dated: August 23, 1948.

/s/ LOUIS GOODMAN,

U. S. District Judge.

[Endorsed]: Filed Aug. 23, 1948.

[Title of District Court and Cause.]

ORDER THAT PLAINTIFFS WHO SUED AS
INFANTS NOW APPEAR AS ADULT
PLAINTIFFS

Counsel for plaintiffs, in open Court, having this day informed the Court that each of the plaintiffs who heretofore appeared herein as an infant by his or her next of friend and guardian ad litem since then has attained his or her majority,

Now, therefore, it is ordered that each of said plaintiffs heretofore so appearing henceforth shall appear herein as an adult person in his or her own proper name.

September 27, 1948.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Received copy of the above Order this 27th day of September, 1948.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.
Defendants.

By /s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 27, 1948.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25294-G

Cons. No. 25294-G

TADAYASU ABO, et al., etc.,

Plaintiffs,

vs.

TOM CLARK, etc., et al.,

Defendants.

INTERLOCUTORY ORDER, JUDGMENT
AND DECREE

This cause, together with that in its companion proceeding No. 25295-G heretofore consolidated with this proceeding under No. 25294-G, having heretofore been submitted to this Court for decision on the merits pursuant to written stipulation entered into between the parties on October 10, 1947, and the order of this Court thereon made on said date, after oral argument had and after briefs of the parties had been filed herein, and this Court being duly advised in the premises and the cause, facts, matters, issues and law pertinent thereto thereafter having been duly considered by this Court and this Court having filed herein its written Opinion herein, this Court now finds, orders, adjudges and decrees as follows:

(1) It Is Ordered that the defendants herein may have to and including one hundred twenty (120) days from and after the filing and entry of

this interlocutory order, judgment and decree, unless they earlier consent in writing herein to shorten said period of time or waive such a right, within which they may, in an exercise of good faith, by a writing or writings to be filed herein, designate any of the plaintiffs herein for special individual further hearings herein, upon their election, evidenced by any such designation, at which to produce admissible evidence relevant to the issues herein, other than that heretofore offered or introduced in evidence herein on the issues involved, against each such designated plaintiff proving or tending to prove that each such designated plaintiff renounce United States nationality and citizenship of his or her own free will, choice, desire and agency and that such renunciation was not caused by or affected by the duress, menace, coercion, intimidation, fraud and the undue influence under which he or she knowingly was held and subjected to at the time and place of renunciation by the United States Government, the defendants, the representatives, agents, servants or employees of said government or by the combined concurrent duress, menace, coercion, intimidation, fraud and the undue influence under which each was held and to which each was subjected at said time and place by alien-led gangs which an individuals who operated in and knowingly were permitted by the said government, its representatives, agents, servants and employees, and the defendants, to whose charge each then was committed, so to operate and act in and about the place where each plaintiff so was

interned and restrained of his or her liberty, provided, however, that as to any such plaintiff or plaintiffs who so shall be designated by the defendants for special individual further hearing herein, the burden of proof shall be and remain upon the defendants herein to prove that the renunciation of each such plaintiff, so designated for such special further hearing herein, was wholly voluntary, uncoerced and uncompelled and was of the free will, choice, desire and agency of such plaintiff and was neither caused by nor affected by the duress, menace, coercion, intimidation, fraud or undue influence in which he or she was held and subjected to, as aforesaid, and that, as to each such plaintiff who so shall be designated no formal judgment herein shall be made or become final until the respective individual special further hearing of such plaintiff or plaintiffs, held after notice duly given, shall have been concluded and then only after formal findings of fact and conclusions of law herein first shall have been signed and filed in any such further proceedings herein.

(2) It Is Ordered, Adjudged And Decreed as and for an interlocutory order, judgment and decree herein for each and all of the plaintiffs in this action whom the defendants do not designate for special individual further hearings herein, as aforesaid, within the period of time aforesaid, as follows, to-wit:

The application for renunciation of United States nationality and citizenship heretofore executed by each said plaintiff, including that of each of them

who then was laboring under the disability of infancy and those of the plaintiffs then mentally incapacitated who appear herein by next of friend and guardian ad litem, and his or her said renunciation thereof, together with the approval and the order of approval thereof heretofore made or executed by the Attorney General of the United States, a defendant herein, be and the same hereby are found and declared to be and they are and each of said things is null, void, invalid, illegal, contrary to public policy, and of no force and effect and they are and each of said things is hereby cancelled, annulled and set aside upon the grounds that each of said renunciations, so executed and made, and the said approval and order approving the same, so executed and made, were the direct and proximate cause, effect and result of the duress, menace, coercion, intimidation, fraud and the undue influence under which each plaintiff, contrary to his or her own free will, desire, choice and agency, at the time of the making, execution and approval thereof, was held, and for a long period of time prior thereto and thereafter had been held, arbitrarily, oppressively, capriciously and continuously in detention and internment and was restrained of his or her liberty in a War Relocation Center and internment camp, bounded by barbed wire, and held under the menacing guns of armed guards and patrols and deprived of his or her national and state citizenships and of all the rights, liberties, privileges and immunities thereof, including freedom of movement and access to his or her respective home in this

country, and to which each plaintiff at all of said times knowingly and intentionally was subjected by the defendants, the United States Government, its representatives, agents, servants and employees and, in particular, the War Relocation Authority, the defendant Attorney General, his predecessor in office and agents of the U. S. Department of Justice, and the military commander of the Western Defense Command and Fourth Army, to whose charge each plaintiff then and there was committed, but who acted under and by virtue of a claimed color of public executive and legislative authority albeit, in the absence of a state of martial rule and declaration of martial law, without constitutional or lawful right or sanction, and without charging any of them with the commission of any crime and without giving any of said plaintiffs a hearing on the cause of said detention and mistreatment or any opportunity for any such hearing or for a release from said confinement, and the same were the direct and proximate cause, effect and result of the joint, combining concurrent duress, menace, coercion, intimidation, fraud and the undue influence under which each plaintiff, contrary to his or her own free will, desire, choice, and agency, at all of said times and at said place then and there had been and was held and subjected to by alien-led gangs and individuals, likewise detained by said public authorities along with plaintiffs, which and whom the defendants, the United States Government, its representatives, agents, servants and employees, to whose charge they were committed and, in particular, the said

War Relocation Authority, the defendant Attorney General, his predecessor in office and agents of the Department of Justice, and the military commander of the Western Defense Command and Fourth Army, which and who, at all of said times and at the place of renunciation willfully, deliberately and wrongfully, with full notice and actual knowledge thereof, made it their policy and practice to permit and openly permitted said gangs and individuals so to hold and subject each plaintiff and they and each of them, knowingly and intentionally failed, refused and neglected to protect each plaintiff against the same, although they and each of them at all of said times had the duty to protect and the opportunity to protect each of said plaintiffs against the same and knew of that duty and opportunity, each and all of which said things and combination of things instilled and created a great fear, distress, hysteria, torment, despair and terror in each plaintiff and operated to deprive and did deprive each plaintiff of legal and mental capacity so to renounce and of freedom of choice, will, desire and agency in and about the making of his or her said renunciation of United States nationality and citizenship and forced and compelled him or her to make said application for renunciation and said renunciation.

(3) It Is Further Ordered, Adjudged And Decreed as to each plaintiff not hereinafter designated for special hearing by the defendants, as hereinbefore set forth, as follows, to-wit: none of said plaintiffs is an alien, foreigner or an alien enemy,

but on the contrary, each of said plaintiffs herein ever since his or her birth in this country has been and now is a native born citizen and national of the United States of America; that, as such, none of them is subject to detention by the defendants or any of them; none of them is subject to removal from the United States under the Alien Enemy Act by the defendants or any of them; none of them is subject to deportation from the United States as an alien by them or any of them; none of them is subject to any restraint upon his or her liberty or any infringement upon his or her rights, privileges or immunities as an American citizen by the defendants or any of them; and none of them can be restricted in his or her freedom of movement or be denied access to his or her home in this country by the defendants or any of them; and the defendants, and each of them, their agents, servants and employees, hereby are enjoined and prohibited from detaining any of the plaintiffs, from restraining them of their liberty, from removing or deporting any of them to Japan or any foreign country, from denying them freedom of movement, from denying them access to their homes in this country and from denying them any of their rights, liberties, privileges and immunities as citizens of the United States of America; and that any and all orders heretofore made by the defendants, or any of them, or by any other entity, governmental or private, for the detention, restraint, removal or deportation of any of the plaintiffs from the shores of this country and from denying them

freedom of movement or access to their homes in this country or of depriving them of the full and free exercise of each and all of their rights, liberties, privileges and immunities of United States nationality and citizenship be and the same hereby are ordered cancelled and set aside and they hereby are cancelled and set aside.

(4) It Is Finally Ordered that upon the expiration of one hundred twenty (120) days from the date of this interlocutory order, judgment and decree, or upon any earlier date in the event the defendants complete and file herein their designation of the names of any of the plaintiffs against whom they may wish to present additional evidence at special individual hearings herein, as hereinabove-mentioned, or file a waiver of any such designation, the plaintiffs not so designated thereupon shall prepare and file formal findings of fact and conclusions of law herein and thereupon a final judgment and decree in favor of said such plaintiffs and against the defendants cancelling said renunciations shall be entered herein.

Dated: September 27, 1948.

/s/ LOUIS GOODMAN,

U. S. District Judge.

Approved as to form, as provided in Rule 5(d).
Copy received September 27, 1948.

TOM C. CLARK,

Attorney General.

FRANK J. HENNESSY,

U. S. Attorney.

Defendants.

By /s/ ROBERT B. McMILLAN,

Assistant U. S. Attorney.

Attorneys for Defendants.

[Endorsed]: Filed Sept. 27, 1948.

[Title of District Court and Cause.]ORDER EXTENDING DEFENDANTS' TIME
IN WHICH TO FILE DESIGNATIONS

On application of Frank J. Hennessy, United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the time within which the defendants may file designations of any of the plaintiffs herein, against whom they may wish to present further evidence at special hearings herein, be, and the same is hereby extended to and including February 25th, 1949.

Dated: January 25th, 1949.

/s/ LOUIS GOODMAN,

U. S. District Judge.

[Endorsed]: Filed Jan. 25, 1949.

[Title of District Court and Cause.]

ORDER REQUIRING DEFENDANTS TO
SHOW CAUSE WHY THE DESIGNATION
FILED HEREIN FEBRUARY 25, 1949,
SHOULD NOT BE STRICKEN AND FINAL
ORDER, JUDGMENT AND DECREE
IN FAVOR OF EACH AND ALL OF THE
PLAINTIFFS AND AGAINST DEFEND-
ANTS BE ENTERED IMMEDIATELY
UPON SETTLEMENT OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Upon reading and filing the Notice and Motion To Strike Designation and affidavit of merits in support thereof and for Order To Show Cause filed herein by the plaintiffs and good cause appearing therefor,

It Is Ordered and directed that the defendants in this cause, through their attorneys, appear and be before this Court on Monday, March 7, 1949, at the hour of 10 o'clock a.m. of said day, then and there to show cause, if any they have, why the "Designation of Plaintiffs" filed herein by the Defendants on February 25, 1949, should not be ordered stricken and be stricken from the record herein.

It Is Further Ordered that a copy of this order, together with copies of said Notice and Motion to Strike and Affidavit of merits in support thereof and for Order To Show Cause be served upon the United States Attorney for this District as the representative of the Attorney General and as one

of the attorneys of record for the defendants herein by the 1st day of March, 1949.

Dated: Feb. 28, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE
DESIGNATION OF PLAINTIFFS

To Defendants and Tom C. Clark, Attorney General, H. G. Morrison, Assistant Attorney General, Frank J. Hennessy, United States Attorney, Enoch E. Ellison, Special Assistant to the Attorney General, and Paul J. Grumbly, Attorney, Department of Justice, Attorneys for Defendants:

You and each of you will please take notice that on Monday, the 7th day of March, 1949, at the hour of 10 o'clock a.m. of said day, or so soon thereafter as counsel can be heard thereon, the plaintiffs will bring on the within motion for hearing and decision before the above-entitled Court at the courtroom thereof, 2nd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California.

Dated: Feb. 28, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

Receipt of a copy of the above notice together with a copy of the motion to strike therein mentioned and the Affidavit in support thereof and Order To Show Cause are admitted this 28th day of Feb., 1949.

TOM C. CLARK,
Attorney General.

H. G. MORRISON,
Assistant Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

ENOCH E. ELLISON,
Special Assistant to the
Attorney General, and

PAUL J. GRUMBLY,
Attorney,
Department of Justice.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Defendants.

[Title of District Court and Cause.]

MOTION TO STRIKE DESIGNATION
OF PLAINTIFFS

Plaintiffs move to strike the Designation of Plaintiffs filed herein by the defendants on February 25, 1949, upon the following grounds and for the following reasons, to-wit:

1. That Designation, as made, is actually a list of all or practically all the plaintiffs in the suit and, in consequence, violates the provisions of the written stipulation of the parties heretofore entered into on October 10, 1947, and Order of this Court thereon filed herein on October 13, 1947, closing the proof and submitting the cause on the merits for decision by this court.

2. That Designation violates the letter, spirit and provisions of the written Opinion of the Court made on the merits of the cause after due submission thereof to the Court by the parties hereto which said Opinion was filed herein on April 29, 1948.

3. That Designation in nowise complies with but is in direct violation of and flouts the provisions of the Interlocutory Order, Judgment and Decree made and entered herein on September 27, 1948, relating to the designation of individual plaintiffs, if any, against whom the defendants might elect to present additional evidence at special individual hearings, as therein provided.

4. That Designation, as made by defendants, is not such a designation as was permitted by the

Interlocutory Order, Judgment and Decree made and entered herein on September 27, 1948, which required a designation, if any was to be filed herein by defendants, to be made and filed by defendants in an exercise of good faith.

5. That Designation, as made by defendants, is sham, impertinent, irrelevant and immaterial and relates and pertains to and covers nothing but issues of fact heretofore determined, decided and resolved by this Court in favor of the plaintiffs and against the defendants, as appears from the fact that each and every item of proof offered by the defendants, as set forth in the "General Offer Of Proof" in said Designation heretofore was submitted to this Court for decision on the merits and heretofore was determined, decided and resolved by this Court in favor of the plaintiffs and against defendants, as covered by the said written Opinion of this Court and the said Interlocutory Order, Judgment and Decree.

6. That Designation violates the oral representations made to this Court and to counsel for the plaintiffs on January 25, 1949, by Paul J. Grumbly, attorney for the Department of Justice and defendants, in obtaining an order of this Court extending the time of the defendants to February 25, 1949, within which to file, in an exercise of good faith, a proper designation, if any, of individual plaintiffs, if any, for special hearings.

7. That Designation is not a true or proper designation, within the contemplation of the Court

or parties, but is sham, impertinent, irrelevant and evasive and was not filed in good faith by the defendants and violates and flouts the purposes for which each extension of time was given defendants since April 29, 1948, within which to file any such designation.

This motion to strike will be made upon the pleadings, records, files, evidence, papers and documents herein and upon this motion, notice hereof, affidavit of merits in support hereof, order to show cause, and also upon the following pleadings and records herein, to-wit: (1) the written stipulation submitting the cause to this Court for decision on the merits of the cause dated Oct. 10, 1947, and the order of this Court issued thereon; (2) the written Opinion of this Court made and entered herein on April 29, 1948; (3) the Interlocutory Order, Judgment and Decree made and filed herein on September 27, 1948; (4) the various stipulations of the parties and court orders extending the defendants' time within which to file a designation, as above referred to and (5) the Designation filed herein on February 25, 1949, by defendants.

Dated: February 28, 1949.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
STRIKE DESIGNATION AND FOR OR-
DER TO SHOW CAUSE

Northern District of California,
State of California,
City and County of San Francisco—ss.

Wayne M. Collins being first duly sworn, deposes and says:

He is and at all times since the institution of the within referred to suit has been the attorney of record for the plaintiffs herein:

Just prior to October 10, 1947, Thomas Cooley, II, Esq., then the director of the alien enemy control unit of the Department of Justice and one of the attorneys on the staff of the defendant Attorney General who was one of the attorneys for the defendants herein, orally informed affiant that the defendants had no further evidence whatever to introduce in the cause against plaintiffs or any of them other than that already filed in documentary form therein.

Thereafter, on October 10, 1947, counsel for the respective parties hereto entered into a written stipulation that the cause be submitted to this Court for decision on the merits of the cause, upon which the order of this Court was made so ordering, which said stipulation and order were filed and entered in the cause on October 13, 1947, and

that at said time it was understood and agreed between the attorneys for the respective parties hereto and they represented to this Court at said time that the evidence that as of that date had been offered on the issues raised by the pleadings and in the case covered all the evidence to be offered by either the plaintiffs or the defendants and that no further or additional evidence would be submitted unless the Court itself ordered the production of further or additional evidence thereon.

By the written stipulation entered into between the parties plaintiffs and defendants on October 10, 1948, and the Court order which issued thereon, filed herein on October 13, 1948, the plaintiffs and defendants stipulated and agreed and the Court ordered, in part, as follows:

“that the proofs be closed, provided, however, that if the Court deems it necessary for a proper decision of any factual or legal issue involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon,——.”

This Court has not at any time whatever deemed it necessary for a proper decision of any factual or legal issue involved in the case as to any particular plaintiff or plaintiffs to order the production of further or additional evidence on any issue involved in the case and has not made any such order or orders for the production of any further or additional evidence herein.

Thereafter, on April 29, 1948, this Court made

and filed its written Opinion herein which states, in part, as follows:

“It may be that if the defendants were to go forward with further proof, they could present evidence that certain of the plaintiffs individually acted freely and voluntarily despite the present record facts.”——

and therein gave the defendants ninety (90) days within which to file a designation of any such plaintiffs for special further hearings and provided therein for an interlocutory decree to be entered in favor of plaintiffs and against defendants.

Thereafter, the defendants obtained from this Court an order dated and filed herein on July 27, 1948, extending defendants' time within which to file any such designation to and including August 28, 1948.

Thereafter, at the oral request of attorneys in the Justice Department affiant withheld presenting the Interlocutory Order, Judgment and Decree to give defendants additional time within which to designate any of the plaintiffs in accordance with the said Opinion of the Court and so to do and thereafter consented, on August 23, 1948, with the attorneys for the defendants that defendants' time within which to file any such designation be extended 120 days from and after the entry of the interlocutory order, judgment and decree.

Thereafter, the defendants obtained from this Court an order dated and filed herein on August 23, 1948, extending defendants' time within which

to file any such designation to and including one hundred twenty (120) days from and after the date the plaintiffs filed their interlocutory order, judgment or decree in favor of the plaintiffs and against the defendants, the plaintiffs consenting thereto.

Thereafter, on September 27, 1948, the Interlocutory Order, Judgment and Decree was made and entered herein. It provides, in part, as follows:

“It Is Ordered that the defendants herein may have to and including one hundred twenty (120) days from and after the filing and entry of this interlocutory order, judgment and decree,, within which they may, in an exercise of good faith, by a writing or writings to be filed herein, designate any of the plaintiffs herein for special individual further hearings herein, upon their election, evidenced by any such designation, at which to produce admissible evidence relevant to the issues herein, other than that heretofore offered or introduced in evidence on the issues involved, against each such designated plaintiff proving or tending to prove that each such designated plaintiff renounced United States nationality and citizenship of his or her own free will, choice, desire and agency and that such renunciation was not caused by or affected by the duress, menace, coercion, intimidation, fraud and the undue influence under which he or she knowingly was held and subjected to at the time and place of renunciation,—provided, however, that as to any such plaintiff or plaintiffs who so shall be designated by the defendants for special in-

dividual further hearing herein, the burden of proof shall be and remain upon the defendants herein to prove that the renunciation of each such plaintiff, so designated for such special further hearing herein, was wholly voluntary, uncoerced and uncompelled and was of the free will, choice, desire and agency of such plaintiff and was neither caused nor affected by the duress, menace, coercion, intimidation, fraud or undue influence in which he or she was held and subjected to,——.”

Thereafter, at the request of the defendants on January 25, 1949, and over the oral objections of affiant as attorney for the plaintiffs, and upon the representations of Paul J. Grumbly, an attorney for the Department of Justice who appeared for the defendants, made to the Court that the names of plaintiffs who would be designated, if any, would be few in number and that any such designation would be made in good faith, the Court signed an Order extending the defendants' time to and including February 25, 1949, within which defendants might file such a designation, if any.

Up to and including February 25, 1949, the defendants had a total of ten (10) calendar months within which to make a proper designation of certain plaintiffs, if any, for special individual hearings, but the defendants have not so done.

On February 25, 1949, the defendants filed herein a Designation of Plaintiffs.

The Designation of Plaintiffs, as filed herein by the defendants on February 25, 1949, contains a

list of all or substantially all the names of all the parties plaintiff in the suit; said designation classifies the plaintiffs into different types or groups, one of which, viz., Exh. XXI-1, in suit No. 25294, is a list of eight (8) plaintiffs the defendants admit were insane at the time of their renunciations and incompetent to renounce and another list, Exh. XXI-1, is a list of eight (8) plaintiffs whose renunciations the defendants admit were never approved by the Attorney General; none of the classified lists of names contained in said Designation has any relevancy to a proper designation of names of individual plaintiffs against whom the defendants elect to present additional evidence at special individual hearings; the "General Offer of Proof" contained in said Designation shows that the issues therein contained on which the defendants make an offer of proof relates to and covers matters and issues heretofore decided by the Court against the defendants and in favor of the plaintiffs; and affiant alleges that said Designation is improper, irrelevant, impertinent, sham, evasive, and dilatory; that it was not filed by defendants in an exercise of good faith and should be stricken from the record in the cause.

Wherefore plaintiffs and affiant as their attorney requests and moves that plaintiffs' motion to strike the Designation of Plaintiff filed herein on February 25, 1949, be granted and that an Order to show cause issue, directed to the defendants, requiring the defendants to appear and be before this Court

at a time therein to be specified, then and there to show cause why the Designation of Plaintiffs filed by defendants herein on February 25, 1949, should not be stricken from the record and a final order, judgment and decree be entered in favor of each and all of the plaintiffs and against the defendants immediately upon the settlement of the findings of fact and conclusions of law.

/s/ WAYNE M. COLLINS,

Affiant,

Attorney for Plaintiffs.

Subscribed and sworn to before me this 28th day of February, 1949.

[Seal] /s/ JANE M. DOUGHERTY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Feb. 28, 1949.

[Title of District Court and Cause.]

STIPULATION AND ORDER THAT PLAINTIFFS HERETOFORE APPEARING AS INFANTS BY GUARDIAN AD LITEM OR NEXT OF FRIEND, HAVING REACHED MAJORITY, NOW APPEAR AS ADULT PARTIES PLAINTIFF.

Whereas when this suit was filed in 1945 in excess of one hundred (100) of the plaintiffs then were minors, and thereafter a number of persons were joined as plaintiffs herein when they were

minors, each of said such persons heretofore appearing herein by guardian ad litem or next of friend, and whereas each of said infant plaintiffs so appearing herein since his or her joinder as a party plaintiff herein has reached his or her majority of twenty-one (21) years, Now, Therefore, It Is Stipulated that each of said persons who heretofore appeared as an infant herein by guardian ad litem or next of friend now appear herein as an adult person in his or her own true proper name and that the orders heretofore made and entered herein for their appearance by guardian ad litem or next of friend now be terminated, it being stipulated that it is not necessary to set forth their individual names herein.

Dated: March 4, 1949.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Defendants.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

So ordered: March 4, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed March 4, 1949.

[Title of District Court and Cause.]

ORDER APPOINTING GUARDIAN AD LITEM

Good cause appearing therefor, it is hereby ordered that the plaintiffs herein, Shigeno Fudetani, Nagatoshi Hashiguchi, Flora Helen Shoji, Torao Sumi, Yoshikazu Toda and Yutaka Tom Uyehara, each of whom is a mental incompetent, be and each of them is hereby authorized to appear herein by Harry Uchida as his or her next of friend and guardian ad litem of each of them.

Dated: March 4, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Receipt of a copy of the above order is hereby admitted this 4th day of March, 1949.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed March 4, 1949.

[Title of District Court and Cause.]

STIPULATION AND ORDER SUBSTITUTING
DEFENDANTS IN REPRESENTATIVE
CAPACITIES.

Whereas Dean G. Acheson has succeeded to the office of the Secretary of State, and Watson B. Miller has succeeded to the office of the Commissioner of Immigration and Tom C. Clark has succeeded to the office of the Alien Property Custodian, and their predecessors in said offices were sued as defendants herein in their respective representative capacities,

It Is Stipulated between the parties hereto, as follows:

1. That the amended complaint and pleadings herein be amended and deemed amended substituting the name of Dean G. Acheson, as the Secretary of State, as a defendant herein in lieu of James F. Byrnes, his predecessor in said office;

2. That the amended complaint and pleadings herein be amended and deemed amended substituting the name of Tom C. Clark, as the Alien Property Custodian, as a defendant herein in lieu of James E. Markham, his predecessor in said office;

3. That the amended complaint and pleadings herein be amended and deemed amended substitut-

ing the name of Watson B. Miller, as the Commissioner of Immigration, as a defendant herein in lieu of Ugo Carusi, his predecessor in said office.

Dated: March 21, 1949.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Defendants.

/s/ WAYNE M. COLLINS,
Attorney for Plaintiffs.

So ordered: March 21, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed March 21, 1949.

[Title of District Court and Cause.]

ORDER STRIKING DEFENDANTS'
DESIGNATION OF PLAINTIFFS

The motion of the plaintiffs to strike the "Designation of Plaintiffs In Compliance With The Court's Order Entered Herein On September 27, 1948", which was filed herein by the defendants on February 25, 1949, and the order to show cause why said "Designation of Plaintiffs" should not be ordered stricken and be stricken from the record

and files herein came on regularly to be heard before this Court the 21st day of March, 1949, Wayne M. Collins, Esq., appearing for the plaintiffs and Robert B. McMillan, Esq., Assistant U. S. Attorney, appearing for the defendants. The defendants on March 7, 1949, filed a return to said motion and on March 18, 1949, a supplemental return thereto. Oral argument was made in support of and against said motion and in said order to show cause and the matter thereupon was submitted by the parties to the Court for decision;

As part of defendants' oral argument on said motion and order to show cause, defendants' counsel who appeared and argued for the defendants read to the Court part of a letter of instructions received by him from the office of the Attorney General relating to the said "Designation" filed by defendants herein on February 25, 1949, reading as follows:

"In making such designations we have given careful consideration to Judge Goodman's view that they should be made by the Government in the interests of justice. If this means that we should be convinced by the available evidence that the renunciations were voluntary, in the sense that they were not the results of fears of physical violence but were actually desired at the time they were made, you may assure him that we are so convinced. You may further assure him that, in our view, at least as strong a case can be made for sustaining the validity of the renunciations here

as were made in the cases now on appeal from the decisions of the District Court for the Southern District of California. In view of that fact and in view of Judge Goodman's opinion in the instant cases, the Attorney General feels that he cannot properly concede that the renunciations of any of the designated plaintiffs were involuntary as a matter of fact or law. He, of course, reserves the right to take a different position in the event that the decisions now on appeal should be sustained.

"In view of the pending of such appeals and the possibility that they may prove dispositive of many of the instant cases it seems desirable, as a practical matter, to avoid trials as to plaintiffs designated in Exhibit XIX until after final action on the appeals. Indeed, it is within the realm of possibility that the final decisions in the cases on appeal will render any further proceedings unnecessary."

This Court finds that the said "Designation of Plaintiffs" filed by the defendants herein on February 25, 1949, contains a list of all or substantially all the names of the parties plaintiff in the suit; that it classifies the plaintiffs into different types or groups; that none of the classified lists of names of plaintiffs contained therein has any competency, relevancy or materiality to any issue or any bearing on any issue not heretofore decided by this Court or to any new issue of fact or proof against any plaintiff or plaintiffs; that the "General Offer Of Proof" contained therein relates to and covers offered matters of proof of factual issues

which heretofore were considered and decided by this Court in favor of the plaintiffs and against the defendants after the cause had been submitted to this Court for decision on the merits of those issues and those issues of fact that been resolved by this Court in favor of the plaintiffs and against the defendants, as decided in this Court's Opinion made and entered herein on April 29, 1948, and as covered by the Interlocutory Order, Judgment and Decree made and entered herein on September 27, 1948, and the Court finds that the "Defendants' Return To Order To Show Cause Why Previously Filed Designation Of Plaintiffs Should Not Be Stricken" filed by defendants herein on March 7, 1949, and the "Defendants' Supplemental Return To Court's Order To Show Cause Why Previously Filed Designation of Plaintiffs Should Not Be Stricken" filed herein on March 18, 1949, relate to nothing but factual issues heretofore decided by this Court in favor of the plaintiffs and against the defendants which were resolved in favor of plaintiffs and against defendants when the Court's Opinion was made and entered herein on April 29, 1948, and which formed a basis for the Interlocutory Order, Judgment and Decree of this Court entered herein on September 27, 1948.

And the Court finds that the said "Designation of Plaintiffs", so filed by the defendants herein on February 25, 1949, does not conform to the spirit, purpose or provisions of the written Opinion of this Court made and entered herein on April

29, 1948, or to the provisions of the Interlocutory Order, Judgment and Decree made and entered herein on September 27, 1948, and that it is not the type of designation for which an opportunity to designate was given by this Court to the defendants; and finds and concludes that the defendants' said "Designation Of Plaintiffs In Compliance With The Court's Order Entered Herein On September 27, 1948" should be ordered stricken and be stricken from the record and files herein; and the defendants not having shown good cause why a final order, judgment and decree should not be made and entered herein in favor of each and all of the plaintiffs and against the defendants, as prayed for in the amended complaint herein; and it appearing that the Motion Of The Plaintiffs To Strike that designation of plaintiffs filed herein by the defendants should be granted, and Good Cause Appearing Therefor,

Now, Therefore, This Court Orders that the said "Designation Of Plaintiffs In Compliance With The Court's Order Entered Herein On September 27, 1948," which was filed herein by the defendants on February 25, 1949, be stricken from the records and files herein and the same hereby is stricken from the records and files herein and the plaintiffs are directed to prepare and file forthwith herein formal written findings of fact and conclusions of law upon which the final order, judgment and decree of this Court is to be made and entered

herein in favor of each and all of the plaintiffs and against the defendants, as prayed for in their amended complaint on file herein.

Dated: March 23, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Receipt of a copy of the foregoing Order is hereby admitted this 23rd day of March, 1949.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Defendants.

[Endorsed]: Filed March 23, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause, together with its companion suit No. 25295-G heretofore consolidated with this suit under No. 25294-G, having heretofore been submitted to the Court, sitting without a jury, for decision on the merits of the cause, pursuant to written stipulation entered into between the parties hereto on October 10, 1947, and the order of this Court thereon made on October 13, 1947, pursuant thereto,

and this Court thereafter, on April 29, 1948, having rendered and filed its written Opinion on the issue involved and, thereafter, on September 27, 1948, having made and entered its written interlocutory order, judgment and decree in favor of the plaintiffs and against the defendants herein and having provided in said interlocutory order, judgment and decree for the formal findings of fact and conclusions of law to be prepared and filed herein and judgment thereon to be entered herein, and the time for the presentment of said formal findings of fact and conclusion of law upon which judgment is to be rendered having arrived, and the Court having duly considered the issues and matters involved herein and being fully advised in the premises now makes its findings of fact and conclusions of law on the issues herein, as follows:

Findings of Fact

Findings As to the First Cause of Action:

1. The allegations contained in paragraphs I, II and III of the amended complaint are true and correct.
2. The allegations contained in paragraph V of the amended complaint are true and correct, except the allegation that the Attorney General approved none of the applications and issued no orders approving them, it being found that he approved each of them by orders either before or since this suit was commenced.
3. The allegations contained in paragraph VI

of the amended complaint are true and correct but this court finds that no hearings were required to be given to plaintiffs.

4. The allegations contained in paragraphs IV and VII of the amended complaint were true and correct as at the time this suit was brought but since then each plaintiff has been released from the detention therein mentioned.

5. This Court does not decide the question of the unconstitutionality of the provisions of Title 8 USCA, Sec. 801 (i) and Sections 316.1 to 316.9, inclusive, of the Nationality Regulations promulgated by the defendant Attorney General, as alleged in paragraph VIII of the amended complaint, on their faces simply because it is of the opinion its decision on the cause should be made without determining the alleged unconstitutionality of the renunciation statute, but does find and conclude that there was a complete lack of constitutional authority for United States administrative, executive and military officers to detain and imprison the plaintiffs and other Interned American Nisei citizens and to hold them in duress and subject them to duress when they were not charged criminally or subject to martial rule and law from the time of their evacuation to the time of their release from the restraint upon their liberty and that said things invalidate and void each of the renunciations executed by the plaintiffs at and from the time of their execution and the approval thereof by the defendant Attorney General.

Findings As to the Second Cause of Action:

1. As to the allegations contained in paragraph I of the second cause of action in the amended complaint, the Court makes the same findings of fact on paragraphs I, II, III, IV, V, VI and VII of the first cause of action in the amended complaint, as incorporated in said paragraph I of the second cause of action, as hereinabove set forth in findings Nos. 1, 2, 3 and 4 made on the first cause of action.

2. The allegations contained in paragraph II of the second cause of action in the amended complaint are true and correct.

3. The allegations of paragraph III of the second cause of action in the amended complaint, in the first paragraph thereof and in subd. (a), (b), (c), thereof are true and correct; the allegations contained in paragraph III (d) are true and correct but it was not incumbent on the Attorney General to give the hearings therein mentioned; the allegations contained in paragraph III (e) of the amended complaint and III (f) of the amended complaint are true and correct; the allegations of paragraph III (g) of the amended complaint were true and correct until the time each of the plaintiffs was released from detention since the commencement of this suit, as aforesaid, by the Attorney General defendant; the allegations of paragraph III (h) are true and correct.

4. The allegations contained in paragraphs IV, V, VI, VIII, IX, X and XI of the second cause of action in the amended complaint are true and

correct but the court does not consider the letter of Abe Fortas in paragraph VII thereof as a pleading therein.

5. The allegations contained in paragraph XII of the second cause of action in the amended complaint are true and correct save and except the allegations that the defendant Attorney General still restrains the plaintiffs from their liberty and finds that, since the commencement of this suit, he has released each plaintiff from the aforesaid detention.

6. The allegations contained in paragraph XIII of the second cause of action in the amended complaint are true and correct.

Findings As to the Third Cause of Action:

1. As to the allegations contained in paragraph I of the third cause of action of the amended complaint, the Court makes the same findings of fact on paragraphs I, II, III, V and VI of the first cause of action in the amended complaint, as incorporated in said paragraph I of the third cause of action, as hereinabove set forth in findings Nos. 1, 2 and 3 made on the first cause of action, and makes the same findings of fact on paragraph XII of the second cause of action in the amended complaint, as incorporated in said paragraph I of the third cause of action, as hereinabove set forth in finding No. 5 made on the second cause of action.

2. The allegations contained in paragraph II of the third cause of action are true and correct, the minor plaintiffs therein mentioned, now adults, be-

ing those who once appeared herein by guardian ad litem because of their said infancy and all those plaintiffs who appeared herein under their own true names as adults but who were infants under the age of twenty-one (21) years when they signed their applications for renunciation or at the time they were given hearings thereon by agents of the defendant Attorney General or at the time the said Attorney General approved their said renunciations, and the adult plaintiffs therein referred to as mental incompetents at said times have been conceded by the defendants to be the following plaintiffs who appear by guardian ad litem or next of friend herein, to-wit: Shigeno Fudetani, Nagatoshi Hashiguchi, Takeo Frank Shimada, Yoshiko (Helen) Shinde, Flora Helen Shoji, Torao Sumi, Yoshikazu Toda and Yutaka Tom Uyehara, who medically did not have sufficient mental capacity to accomplish a legally binding act.

And Amplifying The Findings Of Fact Hereinabove Made On Each Of The Three Causes Of Action Contained In The Amended Complaint, The Court Further Finds, as follows:

In the latter part of 1944, in order to provide for the continued detention in the Tule Lake Center of American citizens there detained who were not charged with crime or subject to martial law or rule, the Attorney General drafted and recommended to Congress the passage of legislation which was enacted as Title 8 USCA, Sec. 801 (i) and, to achieve the objectives of that statute, he promul-

gated Title 8 of the Nationality Regulations, Secs. 316.1 to 316.9, inclusive.

While each plaintiff was detained without constitutional authority by the U. S. Government each executed his or her renunciation application and thereafter renounced his or her U. S. nationality and citizenship and the Attorney General thereafter approved that application and renunciation.

The renunciation application executed by each plaintiff and the renunciation of U. S. nationality and citizenship made by each plaintiff was not of his or her own free will, choice, desire and agency but was compelled and coerced and was caused by and was the direct and proximate result of the duress in which each plaintiff was held and subjected by the U. S. Government, its agents, and the defendants as its agents, and the incidental concurrent duress, menace, coercion, intimidation, fraud and undue influence to which each was subjected and which was exerted upon each plaintiff by groups and individual internees likewise detained. The immediate causative duress factors existing at the Tule Lake Center at the time each plaintiff's application for renunciation was executed and at the time each renounced his or her U. S. nationality and citizenship during his or her unconstitutional imprisonment and which either singly or in combination contributed directly to the execution of such application and the making of said renunciation were as follows:

The internal pressure to renounce, by indoctrina-

tion of the young and threats of violence against recalcitrant internees and their families, exerted by the alien-led repatriate organizations which the government authorities in charge knowingly permitted freely to operate and engage in such activities in the Tule Lake Center; parental pressure exerted on citizen children by detained alien parents, who feared and believed themselves destined by the government for removal to Japan, to prevent family breakup and avoid draft induction which they feared and believed would subject them and their American born citizen children to reprisals on arrival in Japan; fear that community hostility on release from detention would subject them to loss of limb or life and caused plaintiffs to believe renunciation would assure further detention and resultant personal security; conviction that the government would deport them to Japan in any event and that, unless they first renounced U. S. nationality, they would be subject to reprisals on arrival in Japan; mass fear, hysteria and terror resulting as the outgrowth of the combined experience of evacuation, loss of home and assets, isolation from outside communication and concentration in an enclosed, guarded, overpopulated camp with little occupation, inadequate accommodations, dreary and unhealthful surroundings and climatic conditions—producing neuroses built on fear, anxiety, resentment, uncertainty, hopelessness and despair of eventual rehabilitation.

The U. S. Government, the Attorney General,

his agents, the W. R. A. authorities and the defendants at all times mentioned in the amended complaint had actual knowledge of the existence, nature and circumstances of the duress in which each plaintiff was held and under which he or she labored and to which each long had been and was subjected at the times and place of renunciation and of the fears, anxiety, hopelessness, despair and terror which beset each and that the same caused each plaintiff to renounce his or her U. S. nationality and that the renunciation of each plaintiff was coerced and was directly and proximately caused by the duress in which each was held and to which each was subjected by the U. S. government, groups and individuals, as aforesaid, and that the renunciation of each plaintiff was contrary to his or her own free will, choice, desire and agency and that it was coerced and compelled but the Attorney General, nevertheless, accepted and approved the renunciation of each.

Findings As To Answer To Amended Complaint
Relating to the First Cause of Action:

1. The admissions contained in paragraph I of the answer to the amended complaint are true and correct; and the allegations of paragraph I of the amended complaint which are neither admitted nor denied in said paragraph I of the answer thereto are true and correct.

2. The admissions contained in paragraph II of the answer to the amended complaint are true and correct; the allegation therein that no defendants

other than defendants Clark, Hennessy and Wixon have appeared and that, therefore, allegations with respect to such non-appearing defendants are not relevant to the cause is not true; each of the defendants in said cause appeared herein.

3. The denials and assertions contained in paragraph III of the answer to the amended complaint thereof are untrue; the admissions therein contained are true and correct; and further finds that each plaintiff is a native born citizen and national of the United States and that any finding by the defendant Attorney General to the effect that they or any of them have been or were or are dangerous to the United States is not true.

4. The admission contained in paragraph IV of the answer to the amended complaint that each of the plaintiffs is interned as therein admitted was true up to the time each was released from said internment by the defendant Attorney General since the commencement of this suit; that said internment was under removal orders issued by the defendant Attorney General but that in issuing said orders he exceeded the lawful powers vested in him, none of the plaintiffs then, now or at any time since being lawfully subject to detention or removal under the Alien Enemy Act and the presidential proclamations and regulations of the Attorney General therein referred to; the denials therein contained are untrue.

5. The admissions contained in paragraph V of the answer to the amended complaint are true and

correct; the denials therein contained are not true; the assertion therein contained that the renunciation of each plaintiff was in fact approved by the Attorney General is true as to the actual mechanical fact of approval but the approval thereof is invalid and void; the allegation therein contained that each of said renunciations is valid and legally effective is not true and this court finds that each of said renunciations was and is invalid, illegal, ineffective and void from its inception.

6. On the contents of paragraph VI of the answer to the amended complaint this court finds that there was no legal requirement whatever upon the Attorney General to give the renunciation hearings therein referred to but finds that those hearings, as given, were not conducted fairly or in conformity with what otherwise would be constitutional requirements and, on the contrary, were arbitrary and capricious and were given each plaintiff while he or she was held in false imprisonment and actually laboring under the duress in which he or she was held and subjected to by the government, its agents, and the defendants, as its agents, to which the duress, menace, coercion, fraud, intimidation and undue influence exerted upon each of them by terroristic groups and individuals operating in said camp was incidental, of which said facts the Attorney General and his hearing officers then and there had actual knowledge and fully were aware; that each of the plaintiffs then was the victim of said double duress, government caused and, in executing

his or her renunciation and in attending and being subjected to such hearing, was not a free agent but was acting involuntarily and under compulsion of said governmental duress and the said private duress which was an incident thereto; the other and remaining assertions and denials therein contained are not true.

7. The admissions contained in paragraph VII of the answer to the amended complaint are true so far as admitted therein, and, in addition thereto, this court finds that the Attorney General heretofore released each of the plaintiffs from detention and immediate threat of removal from the United States to Japan but that, until then, each plaintiff was held under and was subjected to the duress alleged in paragraph VII of the amended complaint; the denial of the existence of the duress referred to therein is untrue.

8. The admissions, denials and conclusions contained in paragraph VIII of the answer to the amended complaint are true and correct or untrue as found or concluded as hereinabove set forth in paragraph No. 5 of the findings and conclusions on paragraph VIII of the amended complaint relating to the first cause of action, which said findings and conclusions are hereby incorporated herein as findings and conclusions on the contents of paragraph VIII of the answer to the amended complaint.

Findings as to Answer to Amended Complaint
Relating to Second Cause of Action:

1. The allegations, admissions and denials contained in paragraph IX of the answer to the amended complaint are true and correct or untrue as hereinabove specifically covered by the findings of the court covering paragraphs I to VII, inclusive, of the answer to the first cause of action contained in the amended complaint which said findings are hereby incorporated herein.

2. The denials contained in paragraph X of the answer to the amended complaint are untrue.

3. The admission contained in paragraph XI of the answer to the amended complaint of the truth of the allegations contained in subsection (h) of paragraph III of the Second Cause of action contained in the amended complaint is true and correct; the assertion that neither the Government nor any of its agents, servants or employees subjected plaintiffs to the duress therein referred to or any duress is not true; the denial therein contained of all other allegations, except the exceptions therein set forth, is untrue; the admission therein contained that each plaintiff since his or her renunciation and subsequent hearing and order by the Attorney General has been detained for removal to Japan was true until each was released by him prior to the rendition of the Court's written opinion herein, but not since then; and finds all other admissions therein contained to be true and correct except the admission that there was maintained in said Center a disciplinary enclosure in which persons disturbing the orderly conduct of said Center were from time to time detained and finds that several hundred

internees were confined therein by the U. S. authorities in charge for various periods of time lasting from a few hours to eleven months time without just cause and without accusations or complaints being made or filed against them and without any hearings whatever being afforded or given any of them on the question of the cause or reason therefor; finds that the admission therein contained that at the hearings on the orders to show cause by the Attorney General, termed mitigation hearings, each plaintiff was given full opportunity to present such evidence as he wished is not true and finds that, on the contrary, each arbitrarily was subjected to such a hearing at which he was deprived of the right to counsel, to produce witnesses and evidence on his own behalf and to learn of any charges or accusations against him and of a fair and impartial hearing, and of all the incidents thereof, and the court finds that there was no authority vested in the defendant Attorney General to subject the plaintiffs to such hearings.

4. The admissions contained in paragraph XII and XIII of the answer to the amended complaint are true and correct; the denials therein contained are untrue.

5. The matter contained in paragraph XIV of the answer to the amended complaint being evasive is treated as a denial of the matter alleged in paragraph VII of the second cause of action contained in the amended complaint and such denials are found to be untrue; the allegations of fact con-

tained in paragraph VII of the second cause of action contained in the amended complaint are found from the evidence to be true and correct although the court does not consider and give weight to the letter of Abe Fortas as a pleading herein.

6. The denials contained in paragraph XV of the answer to the amended complaint are untrue.

7. The admission contained in paragraph XVI of the answer to the amended complaint is true and correct but the denials therein contained are untrue.

8. The denials contained in paragraph XVII of the answer to the amended complaint are untrue.

9. The admissions contained in paragraph XVIII of the answer to the amended complaint that each plaintiff attempted to revoke his or her renunciation is true and the court finds that each wrote a letter of cancellation thereof to the Attorney General; the assertion therein that his failure and refusal to accept the said revocations was necessitated by law is untrue, the said renunciations being void, illegal and invalid at and from their inception; the admission therein that the defendants refused to release plaintiffs from detention and the assertion the plaintiffs would be removed to Japan pursuant to orders of the defendant Attorney General were true up to the time plaintiffs were released from said detention prior to the time the Court's Opinion was filed herein but not since then.

10. The admissions contained in paragraph XIX of the answer to the amended complaint are true and correct.

Findings as to Answer to Amended Complaint
Relating to the Third Cause of Action:

1. The admissions, allegations and denials contained in the material incorporated by reference in paragraph XX of the answer to the amended complaint are true and correct or untrue as hereinabove specifically covered by the findings of the court thereon and, further, finds that several hundred of the plaintiffs were laboring under the legal disability and incompetency of infancy at the time they signed their respective applications for renunciation and renounced United States nationality and so were laboring when the Attorney General signed orders approving the said renunciations; that a few of the adult plaintiffs, those appearing by guardian ad litem or next of friend herein because of their mental incompetency, were mentally incompetent at the time they signed their applications for renunciation of United States nationality and at the time the Attorney General signed orders approving their said renunciations; that the denial in said paragraph XX of said answer of mental incompetency and the denial therein that the act of renunciation as to the then infant plaintiffs and said medically incompetent adult plaintiffs were without effect because of infancy or other incompetency are untrue.

Findings as to Affirmative Defense to the Three Causes of Action Contained in the Amended Complaint:

1. The allegations contained in subdivisions 1,

2 and 3 of Section "First" of paragraph XXI of the affirmative defense in the answer to the amended complaint are true and correct.

2. The allegations contained in Section "Second" of paragraph XXI of the affirmative defense in the answer to the amended complaint are true and correct but the court finds that the isolation of each plaintiff in the room where the private interview therein referred to was had was part and parcel of the governmental duress in which each was held and that it intensified the fear in which each was held and subjected to by the government and groups and individuals in said camp for, by excluding Nisei, Issei and Caucasian friends and witnesses for each plaintiff therefrom each plaintiff was convinced, in his fear and terror, that the United States Government desired and was demanding and forcing his or her renunciation.

3. As to the allegations contained in Section "Third" of paragraph XXI of the affirmative defense in the answer to the amended complaint, finds that, despite the purposes of the hearing therein mentioned and the instructions the officers therein mentioned may have received none of the plaintiffs fully or at all understood the consequences of his or her act and none of them undertook such act voluntarily, but on the contrary, solely under the compulsion of duress, as hereinabove found; the remaining allegations therein contained are not true.

4. The allegations contained in Section "Fourth" of paragraph XXI of the affirmative defense in the

answer to the amended complaint insofar as it relates to a number of the plaintiffs recites the facts, but as to such, said plaintiffs were members of said organizations only because they were driven into the same by virtue of the duress in which they were held and to which they were subjected by the government, groups and individuals, as hereinabove found; that such persons asserted the beliefs, hopes or desires and acted as they did only because they then and there and for years prior thereto had been deprived of free agency, will choice and desire in so doing and were under said compulsion and duress so to be and do; the other and remaining allegations in said section of said paragraph not hereinabove specifically found to be true and correct being found to be untrue.

5. The allegations contained in Section "Fifth" of paragraph XXI of the affirmative defense in the answer to the amended complaint are true and correct but the court finds that the action of the plaintiffs therein referred to were the direct and proximate result of the duress in which the government held them and subjected them and caused them to be held and subjected, as hereinabove found.

6. The allegations contained in Sections "Sixth" and "Seventh" of paragraph XXI of the affirmative defense in the answer to the amended complaint are true as to a number of the plaintiffs but the knowledge of the facts therein stated was not a causative factor in their retractions of any of said renunciations.

7. The allegations contained in Section "Eighth"

of paragraph XXI of the affirmative defense in the answer to the amended complaint are untrue.

Conclusions of Law

From the foregoing facts the Court concludes, as matters of law, as follows:

1. The court has jurisdiction over the cause and over the persons of each of the plaintiffs and of each of the defendants.

2. The plaintiffs are, and each of them is, entitled to the judgment, decree and relief sought by the amended complaint herein and by the prayer thereof.

3. The United States Government imposed detention, imprisonment and internment imposed upon each plaintiff during which each plaintiff renounced his United States nationality and citizenship in 1945 was lacking in constitutional authority.

4. The application for renunciation of United States nationality and citizenship executed by each plaintiff in 1945, during his or her government imposed detention, imprisonment and internment, the renunciation of his or her citizenship so made and the order of the defendant Attorney General approving each such application and renunciation are, and each of said things is, wholly illegal, contrary to law and public policy and null and void, ab initio, for being directly and proximately caused by the duress and coercion under which each plaintiff was laboring and was held and subjected to at the times thereof by the United States Government, the defendants and their agents, as its representa-

tives, and the concurrent duress, menace, fraud, intimidation, coercion and undue influence under which each plaintiff was held and subjected to by groups and individuals, likewise detained by defendants, which was an incident of and caused by said governmental duress.

5. Each plaintiff at birth and ever since then has been and now is a native born national and citizen of the United States of America and domiciled therein and is entitled to the full and complete exercise and enjoyment of all his or her rights, privileges, liberty and immunities of United States nationality and citizenship.

6. Each plaintiff is entitled to have his or her renunciation application, his or her renunciation and the order of the Attorney General approving the same cancelled and nullified from the time of the making or execution thereof.

7. Any and all orders of the defendant Attorney General for the detention or removal of any of the plaintiffs to Japan or elsewhere are null and void and of no force or effect.

8. Each plaintiff is entitled to freedom from detention, imprisonment and internment and from the threat thereof by the defendants or any of them and to freedom from removal and threat of removal to Japan or elsewhere by the defendants or any of them.

9. Each plaintiff is entitled to freedom of movement within the United States and of access to his or her home in the United States from abroad with-

out any interference therewith by the defendants or any of them, their agents, servants, employees and representatives, and to the full and complete exercise and enjoyment of all his or her rights, privileges and immunities of United States citizenship without restriction being placed thereon by the defendants or any of them, their agents, servants, employees or representatives, and to a permanent injunction restraining, enjoining and prohibiting the defendants and each of them, their agents, servants, employees and representatives from interfering with any of their said freedoms, rights, privileges and immunities of United States nationality and citizenship.

Let the final order, judgment and decree be entered accordingly.

April 12th, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Receipt of a copy of the above Findings of Fact and Conclusions of Law is hereby admitted this 12th day of April, 1949.

TOM C. CLARK,
Attorney General,
FRANK J. HENNESSY,
U. S. Attorney,
Defendants.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed April 12, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 25294-G Cons. No. 25294-G

TADAYASU ABO, et al., etc.,

Plaintiffs,

vs.

TOM C. CLARK, as Attorney General of the United States; FRANK J. HENNESSY, as United States Attorney for the Northern District of California and, as such, the head of the Department of Justice in said District; DEAN G. ACHESON, as the Secretary of State; JOHN W. SNYDER, as Secretary of the Treasury; WATSON B. MILLER, as the Commissioner of Immigration; IRVING F. WIXON, as the District Director of the United States Immigration and Naturalization Service, United States Department of Justice and, as such, the head of the United States Immigration and Naturalization Service for the Northern District of California; TOM C. CLARK, as the Alien Property Custodian; JULIUS A. KRUG, as the Secretary of the Interior; DILLON S. MYER, as Director, War Relocation Authority; RAYMOND R. BEST,

as Project Director, Tule Lake Center; and
IVAN WILLIAMS, as the Officer in Charge,
United States Department of Justice, Immigra-
tion and Naturalization Service, Tule Lake
Center, Newell, Modoc County, California,
Defendants.

FINAL ORDER, JUDGMENT
AND DECREE

This cause, together with its companion suit No. 25295-G heretofore consolidated with this suit under No. 25294-G, having heretofore been submitted to the court, sitting without a jury, for decision on the merits of the cause, pursuant to written stipulation entered into between the parties hereto on October 10, 1947, and the order of this Court thereon made on October 13, 1947, pursuant thereto, and this Court thereafter, on April 29, 1948, having rendered and filed its written Opinion on the issues involved herein and, thereafter, on September 27, 1948, having made and entered its written interlocutory order, judgment and decree in favor of the plaintiffs and against the defendants and the court being fully advised in the premises and the findings of fact and conclusions of law having been settled

and filed in said cause and the Court having directed that its final order, judgment and decree in favor of each and all of the plaintiffs and against the defendants herein be entered in accordance therewith.

Now, Therefore, by reason of the law and the findings aforesaid:—

It Is Ordered, Adjudged and Decreed as and for a final order, judgment and decree in favor of each and all of the plaintiffs and against the defendants herein as follows, to-wit:—

1. The application for renunciation of United States nationality and citizenship heretofore executed by each plaintiff in 1944 or 1945, the renunciation of his or her United States nationality and citizenship and the order of the defendant Attorney General approving each such application and renunciation are, and each of said things is, wholly illegal, contrary to law and public policy, null and void ab initio, and they are, and each of said things is, hereby cancelled and set aside.

2. Each plaintiff at birth and ever since then has been and now is a native born national and citizen of the United States of America and domiciled therein and each is entitled to the full and complete

exercise and enjoyment of all his or her rights, privileges, liberty and immunities of United States nationality and citizenship.

3. The defendants are, and each of them is, and their agents, servants, employees and representatives are, and each of them is, hereby permanently enjoined from detaining, imprisoning or interning the plaintiffs or any of them and from restraining them or any of them of liberty and from removing them or any of them to Japan or elsewhere and from interfering with their freedom of movement within the United States and right of access to their home in the United States from abroad and from interfering with their full and complete exercise and enjoyment of each and all of their rights, privileges and immunities of United States nationality and citizenship.

Done in Open Court this 12th day of April, 1949.

/s/ LOUIS GOODMAN,

U. S. District Judge.

Entered in Civil Docket April 13th, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

MOTION TO SUSPEND INJUNCTIONS
GRANTED IN FINAL JUDGMENTS EN-
TERED HEREIN APRIL 12, 1949, DURING
THE PENDENCY OF APPEALS TAKEN
FROM SAID JUDGMENTS TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT ON APRIL
26, 1949

Defendants move to suspend the injunctions granted in the final judgments made and entered herein on April 12, 1949, upon the following grounds:

1. That on April 26, 1949, defendants filed their notices of appeal to the United States Court of Appeals for the Ninth Circuit from the final judgments made and entered herein on April 12, 1949.

2. That said judgments are, and each of them is, contrary to law.

3. That said judgments are, and each of them is, contrary to the evidence.

4. That if executions of the injunctions granted are not suspended for and during the pendency of said appeal, said plaintiffs, and each of them, will be accorded, during said pendency, the rights of citizens of the United States, and will exercise such rights, including the rights of approximately 1480 plaintiffs, now in Japan, to return to the United States of America, which rights, and the exercise thereof, in the event the judgments herein are reversed, would have been unlawful.

This motion will be made upon the pleadings, records, files, evidence, the judgments herein, and upon this motion and the notice hereof.

Dated: April 26, 1949.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,
Attorney, Department of
Justice,
Attorneys for Defendants.

Memorandum of Points and Authorities
Rule 62(c), Federal Rules of Civil Procedure.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SUSPEND INTERJUNCTIONS GRANTED IN FINAL JUDGMENTS ENTERED HEREIN APRIL 12, 1949, DURING THE PENDENCY OF APPEALS TAKEN FROM SAID JUDGMENTS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON APRIL 26, 1949

To the above-named plaintiffs, and their attorney,
Wayne M. Collins, Esq.:

You and Each of You Will Please Take Notice
that on Monday, the 2nd day of May, 1949, at the
hour of 10:00 o'clock a.m. of said day, or as soon
thereafter as counsel can be heard thereon the de-
fendants will bring on the within Motion for hear-
ing and decision before the above-entitled Court at
the courtroom thereof, Second Floor, Post Office
Bldg., Seventh and Mission Streets, San Francisco,
California.

Dated: April 26, 1949.

/s/ H. G. MORISON,

Assistant Attorney General.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ ENOCH E. ELLISON,

Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,

Attorney, Department of
Justice,

Attorneys for Defendants.

Receipt of a copy of the above Notice, together
with a copy of the Motion, is admitted this 26th
day of April, 1949.

/s/ WAYNE M. COLLINS,

Attorney for Plaintiffs.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States Court of Appeals for the
Ninth Circuit:

Notice Is Hereby Given that the above-named defendants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered in this action on April 12, 1949.

Dated: April 26, 1949.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,
Attorney, Department of
Justice,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court, and to
Wayne M. Collins, Esq., attorney for plaintiffs:

The above-named defendants, by their attorneys
herein, hereby designate for inclusion in the tran-
script of record upon appeal the complete record
and all the proceedings in the action, pursuant to
the provisions of Rule 75(o) of the Federal Rules
of Civil Procedure and Rule 11(1) of the Rules
of Practice of the United States Court of Appeals
for the Ninth Circuit.

Dated: April 26, 1949.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,
Attorney, Department of
Justice,
Attorneys for Defendants.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

ORDER MODIFYING FINAL ORDER,
JUDGMENT AND DECREE

Good Cause appearing therefor, the final order, judgment and decree entered herein April 12, 1949, is hereby modified by adding at the end thereof the following:

The restraints imposed upon defendant Secretary of State, his servants, employees and representatives in this decree, shall not affect the exercise of the authority and powers conferred upon him and them pursuant to 8 USC 903 with respect to persons abroad claiming United States nationality or citizenship.

Dated: May 2, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed May 2, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled

case, and that they constitute the Record on Appeal herein, as designated by the Appellants;

Complaint to Rescind Renunciation of Nationality, to Declare Nationality, for Declaratory Judgment and for Injunction.

Order Appointing Next of Friend and Guardian Ad Litem for Minor Plaintiffs, filed Nov. 13, 1945.

Summons.

Withdrawal and Dismissal, filed Dec. 7, 1945.

Stipulation, filed Dec. 7, 1945.

Stipulation, filed Dec. 11, 1945.

Withdrawal and Dismissal, filed Dec. 20, 1945.

Stipulation to Inclusion of Additional Parties as Plaintiffs in Suit, filed Dec. 20, 1945.

Order Joining Parties Plaintiff, filed Dec. 20, 1945.

Stipulation and Order, filed Dec. 31, 1945.

Stipulation and Order, filed Jan. 2, 1946.

Stipulation and Order, filed Jan. 2, 1946.

Stipulation and Order, filed Jan. 2, 1946.

Stipulation and Order, filed Feb. 7, 1946.

Stipulation and Order to Inclusion of Additional Parties as Plaintiffs in Suit, filed Mar. 4, 1946.

Stipulation and Amendment to Complaint to Rescind Renunciation of Nationality, filed Mar. 4, 1946.

Stipulation and Order Re Production of Petitioners, filed Mar. 14, 1946.

Stipulation and Order Extending Time, filed Mar. 14, 1946.

Stipulation and Order to Inclusion of Additional

Parties as Plaintiffs in Suit, filed Mar. 19, 1946.

Stipulation and Order to Inclusion of Additional Parties in Suit, filed Mar. 27, 1946.

Stipulation and Order Extending Time, etc., filed Apr. 4, 1946.

Motion to Strike, filed Apr. 15, 1946.

Points and Authorities in Support of Motion to Strike, filed Apr. 15, 1946.

Stipulation and Order Extending Time, filed Apr. 22, 1946.

Plaintiffs' Points and Authorities in Opposition to Defendants' Motion to Strike, filed May 2, 1946.

Stipulation and Order Extending Time, filed May 6, 1946.

Stipulation and Order Extending Time, filed May 13, 1946.

Stipulation and Order Extending Time, filed May 27, 1946.

Memorandum Supplemental to Points and Authorities in Support of Motion to Strike, filed June 21, 1946.

Stipulation and Order to Inclusion of Additional Parties as Plaintiffs in Suit, filed June 21, 1946.

Memorandum Briefed in Support of Motions to Strike, filed July 5, 1946.

Petitioners' Supplemental Memorandum in Opposition to the Motion to Strike, filed July 10, 1946.

Order, filed July 11, 1946.

Stipulation and Order Extending Time, filed July 27, 1946.

Amended Complaint to Rescind Renunciations of

Nationality, to Declare Nationality, for Declaratory Judgment and for Injunction, filed Aug. 15, 1946.

Order Substituting Parties Defendant, filed Aug. 16, 1946.

Stipulation and Order, filed Aug. 16, 1946.

Stipulation to Substitution of Parties Defendant, filed Aug. 16, 1946.

Stipulation and Order, filed Sept. 9, 1946.

Stipulation to Inclusion of Additional Parties Plaintiff in Suit, filed Sept. 13, 1946.

Order Joining Additional Parties as Plaintiffs in Suit and Appointing Guardian Ad Litem, filed Sept. 13, 1946.

Motion to Strike, filed Sept. 19, 1946.

Memorandum of Points and Authorities in Opposition to Motion to Strike, filed Sept. 20, 1946.

Answer, filed Sept. 23, 1946.

Voluntary Dismissal of Certain Plaintiffs Without Prejudice, filed Sept. 30, 1946.

Order Appointing Guardian Ad Litem, filed Sept. 30, 1946.

Motion to Strike, filed Oct. 10, 1946.

Motion for Summary Judgment, filed Oct. 14, 1946.

Motion for Judgment on the Pleadings, filed Oct. 14, 1946.

Notice of Hearing of Motions, filed Oct. 16, 1946.

Stipulation to Inclusion of Additional Parties Plaintiff in Suit, filed Oct. 17, 1946.

Order Joining Additional Parties as Plaintiffs in Suit, filed Oct. 17, 1946.

Stipulation to Inclusion of an Additional Party Plaintiff in Suit, filed Oct. 23, 1946.

Order Joining an Additional Party as Plaintiff in Suit, filed Oct. 23, 1946.

Respondents' Points and Authorities in Opposition to Complainants' Motion to Strike, filed Nov. 12, 1946.

Respondents' Points and Authorities in Opposition to Complainants' Motion for judgment on the Pleadings, filed Nov. 12, 1946.

Respondents' Points and Authorities in Opposition to Complainants' Motion for Summary Judgment and Cross Motion for Summary Judgment, filed Nov. 12, 1946.

Stipulation to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 18, 1946.

Order Joining Additional Parties as Plaintiffs in Suit and Appointing Guardian Ad Litem, filed Nov. 18, 1946.

Minute Order of November 18, 1946—Motion to Strike and for Summary Judgment to Be Submitted on Briefs.

Briefs for Respondents, filed Nov. 29, 1946.

Affidavit of Thomas M. Cooley, II, filed Dec. 5, 1946.

Praecipe, filed Dec. 11, 1946.

Plaintiffs' Affidavits in Support of Their Motions for Summary Judgment and for Judgment on the Pleadings and to Strike Defendants' Pleadings and in Opposition to Defendants' Cross Motion for Summary Judgment, filed Dec. 11, 1946.

Brief for Plaintiffs, filed Dec. 11, 1946.

Objections and Exceptions to Affidavits of Merit filed by Defendants and Motion to Strike the Same, filed Dec. 18, 1946.

Affidavit of Thomas M. Cooley, II, Dated January 6, 1947, filed Jan. 9, 1947.

Stipulation and Order to Inclusion of Additional Parties as Plaintiffs in Suit, filed Jan. 20, 1947.

Affidavit of Rosalie Hankey, filed Jan. 23, 1947.

Stipulation and Order to Inclusion of Additional Parties as Plaintiffs in Suit, filed Jan. 27, 1947.

Supplemental Brief for Respondents, filed Jan. 27, 1947.

Objection and Exceptions to Evidence, Motion to Strike Same, and Motion to Suppress Evidence Illegally Obtained, filed Jan. 29, 1947.

Plaintiffs' Supplemental Memorandum, filed Feb. 11, 1947.

Consent and Order Reassigning Case, filed Feb. 20, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Mar. 13, 1947.

Affidavit of Thomas M. Cooley, II, filed Mar. 24, 1947.

Stipulation and Order to Inclusion of an Additional Party Plaintiff in Suit, filed Mar. 26, 1947.

Order Appointing Guardian Ad Litem, filed Mar. 26, 1947.

Stipulation and Order to Inclusion of an Additional Party Plaintiff in Suit, filed Apr. 1, 1947.

Order Appointing Guardian Ad Litem, filed Apr. 1, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Apr. 3, 1947.

Stipulation and Order to Inclusion of an Additional Party Plaintiff in Suit, filed Apr. 8, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Apr. 18, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Apr. 28, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 7, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 8, 1947.

Stipulation and Order to Inclusion of an Additional Party Plaintiff in Suit, filed May 16, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 29, 1947.

Release of Certain Plaintiffs and Petitioners in Actions Numbered 25294, 25295, 25296 and 25297, filed June 3, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed June 3, 1947.

Order Appointing Guardian Ad Litem, filed June 3, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed June 30, 1947.

Order Appointing Guardian Ad Litem, filed June 30, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed July 23, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed July 28, 1947.

Stipulation and Order to Inclusion of Additional Party as Plaintiff in Suit, filed July 30, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Aug. 4, 1947.

Voluntary Dismissal of a Party Plaintiff Without Prejudice, filed Aug. 7, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Aug. 7, 1947.

Voluntary Dismissal of a Party Plaintiff Without Prejudice, filed Aug. 7, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Aug. 25, 1947.

Stipulation and Order to Inclusion of an Additional Party Plaintiff in Suit, filed Aug. 25, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiffs in Suit, filed Sept. 4, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Sept. 11, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Sept. 18, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Sept. 30, 1947.

Stipulation, filed Oct. 13, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Oct. 13, 1947.

Stipulation and Order Correcting Names of Parties, filed Oct. 13, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Oct. 16, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Oct. 27, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 3, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 7, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 12, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 12, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 14, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Nov. 28, 1947.

Stipulation and Order to Inclusion of Parties Plaintiff, filed Nov. 28, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Dec. 5, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Dec. 12, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Dec. 19, 1947.

Stipulation and Order Amending Name of Party Plaintiff, filed Dec. 19, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Dec. 23, 1947.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 7, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 12, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 16, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 23, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 23, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Jan. 30, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Feb. 12, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Mar. 8, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Mar. 19, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Apr. 26, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed Apr. 29, 1948.

Opinion, filed Apr. 29, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 18, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 24, 1948.

Stipulation and Order to Inclusion of Additional Parties Plaintiff in Suit, filed May 28, 1948.

Order Extending Time to File Designation of Plaintiffs Concerning Whom Defendants Desire to Present Further Evidence, filed July 27, 1948.

Affidavit of Mailing, filed July 27, 1948.

Defendants' Motion to Dismiss, filed July 27, 1948.

Notice of Motion, filed July 27, 1948.

Plaintiffs' Opposition to Motion to Dismiss, filed Aug. 14, 1948.

Minute Order of August 16, 1948—Motion to Dismiss Denied.

Notice of Motion for Order Authorizing Joinder of Additional Parties Plaintiff, filed Aug. 17, 1948.

Notice of Order Denying Motion to Dismiss, filed Aug. 17, 1948.

Order Joining Parties Plaintiff, filed Aug. 23, 1948.

Notice of Granting Motion for Joinder, filed Aug. 23, 1948.

Order Extending Defendants' Time Within Which to file Designation, filed Aug. 23, 1948.

Notice of Motion for Order Authorizing Joinder of Additional Parties Plaintiff, filed Sept. 14, 1948.

Order Joining Parties Plaintiff, filed Sept. 20, 1948.

Notice of Granting Motion for Joinder, filed Sept. 20, 1948.

Notice of Motion for Order Authorizing Joinder of Additional Parties Plaintiff, filed Sept. 22, 1948.

Motions for Joinder of Additional Parties Plaintiff, etc., filed Sept. 24, 1948.

Notice of Motion for Order Authorizing Joinder of Additional Parties Plaintiff, filed Sept. 24, 1948.

Order That Plaintiffs Who Sued As Infants Now Appear as Adult Plaintiffs, filed Sept. 27, 1948.

Voluntary Dismissal of Certain Plaintiffs, filed Sept. 27, 1948.

Order Joining Parties Plaintiff, filed Sept. 27, 1948.

Interlocutory Order, Judgment and Decree, filed Sept. 27, 1948.

Notice of Granting Motions for Joinder, filed Sept. 30, 1948.

Order Extending Defendants' Time In Which to File Designations, filed Jan. 25, 1949.

Voluntary Dismissal of Certain Plaintiffs, filed Feb. 18, 1949.

Voluntary Dismissal of Certain Plaintiffs, filed Feb. 18, 1949.

Stipulation and Order, filed Feb. 18, 1949.

Stipulation and Order Correcting Names of Plaintiffs, filed Feb. 18, 1949.

Designation of Plaintiffs in Compliance With the Court's Order Entered Herein on September 27, 1948, filed Feb. 25, 1949.

Designation of Plaintiffs in Compliance With the Court's Order Entered Herein on September 27, 1948, filed Feb. 25, 1949.

Stipulation and Order, filed Feb. 25, 1949.

Order Requiring Defendants to Show Cause Why the Designation Filed Herein, etc., filed Feb. 28, 1949.

Stipulation and Order That Plaintiffs Heretofore Appearing as Infants by Guardian Ad Litem, or Next of Friend, Having Reached Majority, Now Appear as Adult Parties Plaintiff, filed Mar. 4, 1949.

Dismissal Without Prejudice, filed Mar. 4, 1949.

Order Appointing Guardian Ad Litem, filed Mar. 4, 1949.

Defendants' Return to Court's Order To Show Cause Why Previously Filed Designation of Plaintiffs Should Not Be Stricken, filed Mar. 7, 1949.

Defendants' Return to Court's Order To Show Cause Why Previously Filed Designation of Plaintiffs Should Not Be Stricken, filed Mar. 7, 1949.

Defendants' Supplemental Return to Court's Order To Show Cause Why Previously Filed Designation of Plaintiffs Should Not Be Stricken, filed Mar. 18, 1949.

Defendants' Supplemental Return to Court's Order To Show Cause Why Previously Filed Designation of Plaintiffs Should Not Be Stricken, filed Mar. 18, 1949.

Stipulation and Order Substituting Defendants in Representative Capacities, filed Mar. 21, 1949.

Order Striking Defendants' Designation of Plaintiffs, filed Mar. 23, 1949.

Defendants' Findings of Fact and Conclusions of Law Lodged March 24, 1949.

Order Extending Time to Make Objections and Propose Amendments to Findings of Fact and Conclusions of Law, filed Mar. 28, 1949.

Defendants' Memorandum of Objections and Proposed Amendments to the Findings of Fact and Conclusions of Law Filed by the Plaintiffs on March 24, 1949, filed Apr. 7, 1949.

Defendants' Proposed Finding of Fact and Conclusions of Law, not lodged nor filed.

Findings of Fact and Conclusions of Law, filed Apr. 12, 1949.

Final Order, Judgment and Decree, filed Apr. 12, 1949.

Motion to Suspend Injunctions Granted In Final Judgments Entered Herein April 12, 1949, During the Pendency of Appeals Taken From Said Judgments to the United States Court of Appeals for the Ninth Circuit on April 26, 1949.

Notice of Motion to Suspend Injunctions Granted In Final Judgments Entered Herein April 12, 1949, During the Pendency of Appeals Taken From Said Judgments to the United States Court of Appeals for the Ninth Circuit on April 26, 1949, filed Apr. 26, 1949.

Notice of Appeal, filed Apr. 26, 1949.

Designation of Contents of Record on Appeal, filed Apr. 26, 1949.

Order Modifying Final Order, Judgment and Decree, filed May 2, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of June, A.D. 1949.

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12251. United States Court of Appeals for the Ninth Circuit. Tom Clark, as Attorney General of the United States, et al., Appellants, vs. Tadayasu Abo, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12251

TOM CLARK, as Attorney General of the United
States, et al.,

Appellants,

vs.

TADAYASU ABO, et al., etc.,

Appellees.

STIPULATION TO DESIGNATION OF CONTENTS OF RECORD ON APPEAL TO BE PRINTED

It is stipulated between the parties, by their respective counsel, that the following portions of the record shall be printed by the appellants in the printed transcript of record on appeal herein, to-wit:

Filing

Date

Of Vol. I.

Names and Addresses of Attorneys.

11-13-45 Complaint, with its Exhibits, but omit listing of all plaintiffs' names and substitute the following therefor,

“Tadayasu Abo, et al.,—adults, individually, and as constituting a class, and as representative of a class, and

“Genshyo Ambo, et al.,—minors, individually, and as constituting a class, and as representatives of a class, by Harry Uchida as the next of friend and as guardian ad litem of them and each of them,

Plaintiffs,”

11-13-45 Order Appointing Next of Friend and Guardian Ad Litem for Minor Plaintiffs.

12-31-45 Stipulation and Order.

1- 2-46 Stipulation and Order.

3- 4-46 Supplement and Amendment to Complaint to Rescind Renunciations of Nationality, and its Exhibits.

- 3-14-46 Stipulation and Order Re Production of
Petitioners.
- 4- 4-46 Stipulation and Order Extending Time,
Etc.
- 4-15-46 Motion To Strike (omitting Points and
Authorities in support thereof).
- 7-11-46 Order.
- 8-15-46 Amended Complaint To Rescind Renun-
ciations of Nationality, To Declare Na-
tionality, For Declaratory Judgment and
for Injunction.
- 8-16-46 Order Substituting Parties Defendant.
- 8-16-46 Stipulation To Substitution of Parties
Defendant.
- 9-19-46 Motion To Strike (omitting Points and
Authorities in support thereof).
- 9-23-46 Answer.
- 9-30-46 Order Appointing Guardian Ad Litem.
- 10-10-46 Motion To Strike (omitting Points and
Authorities in support thereof).
- 10-14-46 Motion for Summary Judgment.
- 10-14-46 Motion for Judgment on the Pleadings
(omitting Points and Authorities).
- 10-16-46 Notice of Hearing of Motions.
- Of Vol II
- 11-12-46 Respondents' Points and Authorities in
Opposition to Complainants' Motion for
Summary Judgment and Cross Motion
for Summary Judgment, omitting there-
from paragraph A and its subsections I,
II, III, IV and V, but print only Para-

graph B, subsection I and prayer thereof which is the cross motion. Also print the Affidavits of John L. Burling, Charles M. Rothstein, Ollie Collins, Joseph J. Shevlin and Lillian C. Scott. Omit therefrom Affidavit of Thomas M. Cooley, II, verified Nov. 7, 1946, and Exhibit A and Exhibit B attached thereto.

11-18-46 Order.

12-11-46 Praecipe.

12-14-46 Plaintiffs' Affidavits In Support of Motions for Summary Judgment and for Judgment on the Pleadings and To Strike Defendants' Pleadings and In Opposition to Defendants' Cross Motion for Summary Judgment. Print also the Affidavits of Tetsujiro Nakamura, Masami Sasaki, Ernest Besig, Rev. Thomas V. Grubbs, and Ann Ray, in support of said motions which are attached thereto. Of Vol. III

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1-23-47 Affidavit (of Rosalie Hankey).

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- 8-23-48 Order Extending Defendants' Time Within Which to File Designations.
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- 4-26-49 Notice of Appeal.
- 4-26-49 Designation of Contents of Record on
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- 5-26-49 Order Modifying Final Order, Judgment
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This Stipulation and Order Thereon.

Dated: June 27th, 1949.

/s/ H. G. MORISON.

Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,
Attorney, Department of
Justice,
Attorneys for Appellants.

/s/ WAYNE M. COLLINS,
Attorney for Appellees.

[Endorsed]: Filed June 27, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It is stipulated between the parties hereto, by their respective counsel, that whereas the whole of the record on appeal herein is identical with that in appeal proceeding No. 12252, now pending in the above-entitled Court and entitled "Tom Clark, as Attorney General of the United States, et al., Appellants, vs. Mary Kaname Furuya, et al., etc., Appellees," with the exception of the names of the parties appellee therein and herein, and

Whereas all the issues of fact and of law which may be determined on the appeal herein are identical with those involved in said appeal proceeding No. 12252, save and except as such determination

of such issues of fact and of law may or shall affect the individual appellees in said appeal proceeding No. 12252,

It Is Stipulated that the Transcript of Record in said appeal proceeding No. 12252 need not be printed on said appeal, unless the same hereafter may be required for the convenience of the Court where pending, but remain in typewritten form as filed and docketed in the above-entitled Court and be held in abeyance pending a final judicial determination of this appeal and, in the event that the final decision of court on this appeal proves to be dispositive of the issues of fact and of law involved in said appeal proceeding No. 12252 that the final judicial decision herein shall also be the final judicial decision therein on said issues of law and of fact and that such decision thereon may be entered therein.

Dated: June 27th, 1949.

H. G. MORISON,
Assistant Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

PAUL J. GRUMBLY,
Attorney,
Department of Justice.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Appellants.

/s/ WAYNE M. COLLINS,
Attorney for Appellees.

So Ordered:

/s/ WILLIAM HEALY,
Judge.

/s/ WM. E. ORR,
U. S. Circuit Judge.

[Endorsed]: Filed July 6, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENTS OF THE POINTS ON
WHICH APPELLANTS INTEND TO RELY

(Rule 19, Subdivision 6.)

The points on which appellants intend to rely on this appeal are the following:

1. The District Court lacked jurisdiction generally over the subject matter of appellants, or any of them.

2. The District Court lacked jurisdiction over persons of appellants.

3. The District Court erred in holding renunciations under Title 8 U.S.C., Section 201, void.

4. The District Court erred in finding renunciations were made under undue influence, duress, or coercion by the United States and/or other residents of Tule Lake, or elsewhere.

5. The District Court erred in holding detention of appellees lacking in constitutional authority.

6. The District Court erred in holding the Attorney General's alien enemy removal orders void.

7. The findings and judgment are not supported by the evidence, and clearly erroneous.

8. The injunction issued is too broad in that it applies to appellees, who have performed, or may perform other acts of expatriation.

9. The decision and judgment of the District Court are contrary to law.

Dated: June 9, 1949.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

/s/ PAUL J. GRUMBLY,
Attorney,
Department of Justice.
Attorneys for Appellants.

All by /s/ R. B. McMILLAN,
Asst. U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed June 9, 1949.

Nos. 12251 and 12252

**In the United States Court of Appeals
for the Ninth Circuit**

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF
THE UNITED STATES, ET AL., APPELLANTS

v.

TADAYASU ABO ET AL., APPELLEES

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF
THE UNITED STATES, ET AL., APPELLANTS

v.

MARY KANAME FURUYA ET AL., APPELLEES

ON APPEALS FROM JUDGMENTS OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION

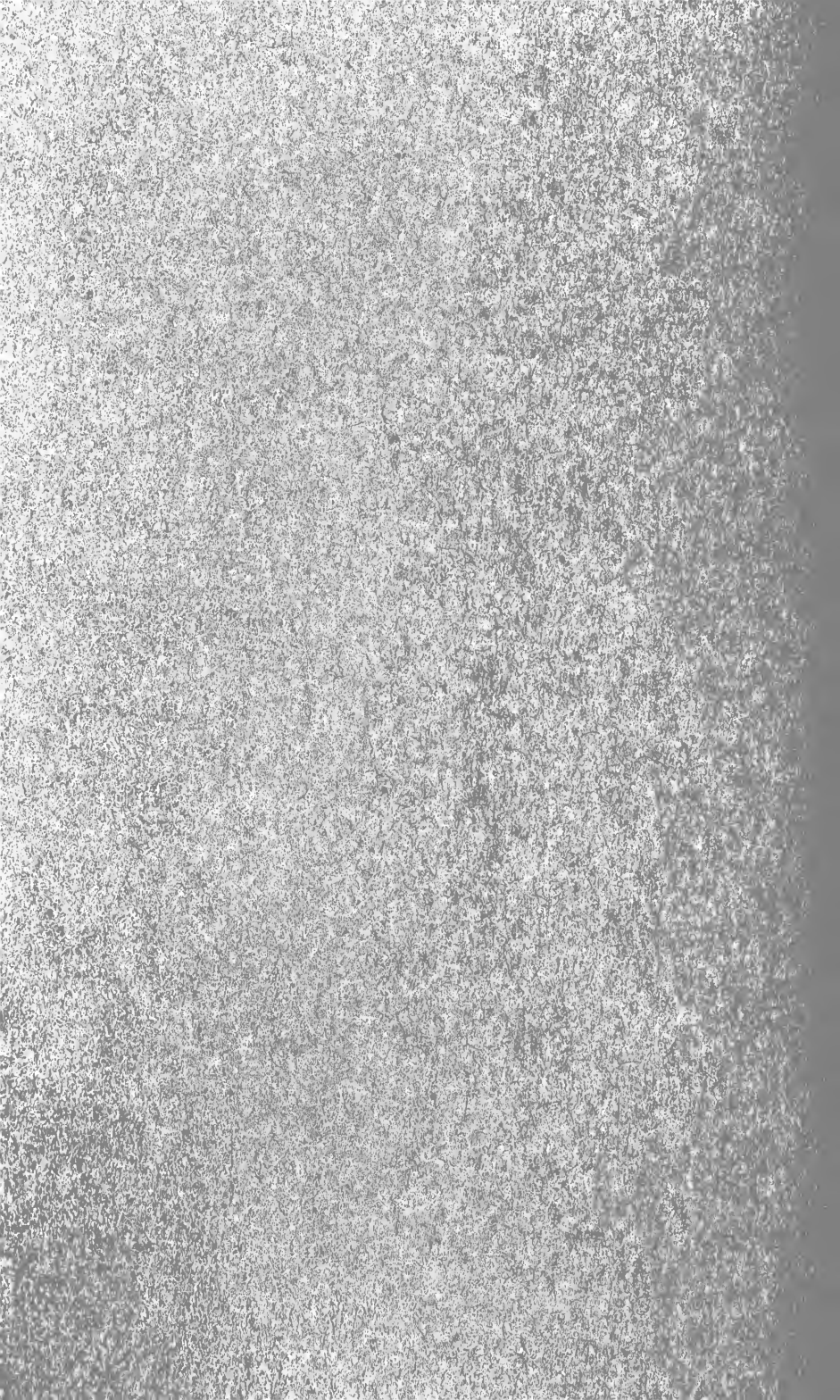
BRIEF FOR APPELLANTS

FILED

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PAUL P. O'BRIEN, -

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In the United States Court of Appeals for the Ninth Circuit

No. 12251

**J. HOWARD McGRATH, AS THE ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS**

v.

TADAYASU ABO, ET AL., APPELLEES

No. 12252¹

**J. HOWARD McGRATH, AS THE ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS**

v.

MARY KANAME FURUYA ET AL., APPELLEES

*ON APPEALS FROM JUDGMENTS OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The appeal in No. 12251¹ is from a judgment entered April 12, 1949 (R. 481-484), as modified by an

¹By stipulation and order herein on June 27, 1949 (R. 510), proceedings in this Court in No. 12252 have been suspended to await the outcome of No. 12251. Accordingly this brief will hereinafter ignore No. 12252. Two companion habeas corpus proceedings, involving a number of the same appellees, are also pending before this Court as Nos. 12195 and 12196. A similar

order entered May 2, 1949 (R. 490), by the United States District Court for the Northern District of California, Southern Division, declaring null and void *ab initio*, and setting aside, renunciations of citizenship theretofore executed by appellees (who hereinafter, for convenience, will be designated plaintiffs as in the court below) and approved by the Attorney General pursuant to the provisions of § 401 (i) of the Nationality Act of 1940, as amended (8 U. S. C. 801 (i)). The judgment also declared that each of the plaintiffs is entitled to all rights of citizenship and permanently enjoins each of the defendants from detaining, imprisoning, or interning the plaintiffs or any of them, and from removing them to Japan or elsewhere and from interfering with their freedom of movement within the United States and right of access to their homes in the United States from abroad (except that the authority of the Secretary of State under 8 U. S. C. 903, with respect to persons abroad ^{and} claiming United States citizenship, is not affected) ^{and} from otherwise interfering with their rights of citizenship.

stipulation and order was entered in No. 12195 (R. 219) with reference to the suspension of proceedings in No. 12196. The record in No. 12195 will be found repeatedly to make reference to the printed record in the instant cause No. 12251, wherein are set forth many of the basic evidentiary documents relating to all cases. This confusing inter-relation of the four pending appeals results from the fact that the causes were consolidated into one proceeding in the court below. Compare, for example, p. 203 of the record in No. 12195 with R. 410 in the instant case. While Nos. 12195 and 12251 are treated separately and briefed separately in this court, it is believed that the fact of their consolidation for purposes of proceedings in the court below should be born in mind in order to avoid confusion that otherwise might result.

The original complaint (R. 2-3 and R. 4-5) named as defendants Tom Clark, as Attorney General; Frank J. Hennessy, as United States Attorney; James F. Byrnes, as Secretary of State; Fred Vinson, as Secretary of the Treasury; Ugo Carusi, as Commissioner of the United States Immigration and Naturalization Service; Irving M. Wixon, as District Director of that Service; James E. Markham, as Alien Property Custodian; Harold Ickes, as Secretary of the Interior; Dillon S. Myer, as Director, War Relocation Authority; Raymond R. Best, as Project Director, Tule Lake; and Irvin Williams, as Officer in Charge of the Immigration and Naturalization Service at Tule Lake. A question in this case is whether any defendant other than Clark, Hennessy, and Wixon, consented to the jurisdiction of the Court (R. 127). The District Court found that all such defendants appeared in the cause (R. 468-469) and obviously directed the above-described judgment against such of the original defendants as remained in office and against the substituted successors in office of the others (R. 123-124, 454-455).

Paragraph I of the amended complaint states that—

this Court has original jurisdiction to entertain the suit by virtue of the provisions of Title 28, U. S. C. A., sec. 41 (1) [now 28 U. S. C. § 1331], Title 8, U. S. C. A., sec. 903, and Title 28, § U. S. C. A., sec. 400 [now 28 U. S. C. § 2201].

The answer of the defendants Clark, Hennessy, and Wixon neither admitted nor denied the conclusions of law contained in Paragraph I of the amended complaint, but did admit the allegation therein that the

plaintiffs are residents of the Northern District of California and that the matter in controversy exceeded the sum of \$3,000 as to each plaintiff, exclusive of interest and costs (R. 126).

As will be more fully shown (see Appendix I, *infra*) 300 plaintiffs remained under actual restraint until released therefrom as a consequence of the orders of the District Court in Nos. 12195 and 12196. Since such plaintiffs continue to be subject to removal orders as dangerous alien enemies and subject to apprehension and actual removal in the event that the decisions of the District Court are ultimately reversed, it is conceded as to them that the District Court had jurisdiction to issue the judgment in this case insofar, but only insofar, as such judgment is against the Attorney General and properly rests upon Section 503 of the Nationality Act of 1940, 54 Stat. 1171 (8 U. S. C. § 903). Many of the present plaintiffs were named as parties to the suit while they were actually interned and subject to removal orders, but thereafter such removal orders were rescinded and they were released from internment pursuant to administrative action (see Appendix A, *infra*). As to these plaintiffs it is conceded that the District Court had jurisdiction, under Section 503, *supra*, as to the Attorney General, at the time that they became parties to the suit, but the question arises as to whether or not the case thereby became moot with respect to them in the sense that no case or controversy, within the reach of the judicial power of the United States, continued to exist. Some 2,556 persons were named as parties to the suit after the removal orders as to

them had been cancelled and after they had been released from custody (see p. 25, *infra*). It is the appellants' position that the District Court never had jurisdiction in the cause in any respect insofar as it relates to such persons.

This Court has jurisdiction to review the judgment of the District Court Under Title 28, U. S. C., Sec. 1291.

STATEMENT

I. The limiting effect on this appeal of the administrative decision to accept and apply the opinion of this court in the case of *Acheson v. Murakami*

In view of the important effect of the Government's decision not to apply for a writ of certiorari in the case of *Acheson v. Murakami*, 176 F. (2d) 953, upon the positions taken in this brief, it seems desirable to set forth an explanation of that matter at this point.

In that case the State Department had refused to issue passports to three American-born women of Japanese descent, on the sole ground that they were no longer citizens or nationals of the United States by reason of their renunciations of citizenship while incarcerated at the W. R. A. segregation center at Tule Lake, California. They brought suit against the Secretary of State, as the head of the Department, thus denying them a right or privilege of citizenship, under 8 U. S. C., § 903, for a judgment declaring them to be nationals of the United States.

That case, like the present case, contained much evidence by way of literature and general affidavits concerning the general conditions and hardships of evacuation, life in the W. R. A. relocation centers,

and the environmental influences and occurrences at the Tule Lake segregation center. Unlike the present case, the record in that case included documentary evidence concerning the plaintiffs' individual acts of renunciation and transcripts of hearings relative thereto. It contained also testimony of the individual plaintiffs, in affidavit form, to the effect that their renunciations were actually influenced by the conditions mentioned. These affidavits formed the basis of specific findings of fact with reference to the involuntary nature of the renunciation of each individual plaintiff, and the District Court held also that they had been found to be free of any suspicion of disloyalty to the United States. Upon this basis it held that the renunciations had been involuntary and were, therefore, void.

In its opinion sustaining the decision of the District Court, this Court emphasized the effects of the evacuation and apparent racial discriminations upon the minds of the evacuees. It pointed to the hardships of life at the Tule Lake center and the presence there of organizations patriotically loyal to Japan and disloyal to the United States, as factors confirming and solidifying the impressions of these people that, as a practical matter, their American citizenship has become valueless. The Court said (at 958):

Fear of reprisal if one failed to renounce his citizenship was for some the final pressure causing such renunciations. Such violence continuing over a year is another of the worse than penitentiary conditions considered *supra*.

Others feared such violence as of the German

mobs if they returned to their homes when they were free to do so.

Accordingly, it is clear that the Court rejected the theory of the renunciation hearing officers of the Department of Justice, that invalidating coercion could consist only in fear of immediate physical punishment, where renunciations were concerned (see R. 174-175) and held that hardships of evacuation and the so-called general conditions at Tule Lake, when taken together with fear of reprisal from the pro-Japanese elements within the center or fear of hostility of the Caucasian population outside the center, were coercive influences, which, if shown to have produced the renunciations, would render them involuntary and therefore void. However, the opinion of the Court did not go so far as to raise a conclusive or even rebuttable presumption of invalidity of the renunciations in absence of evidence that the individual renunciant actually was deprived of his freedom of choice by the impact of such influences.

The effect of this Court's opinion in the *Murakami* case, upon the policies of the executive branch of the Government, went considerably further than a mere decision not to apply for Supreme Court review. Promptly thereafter affirmative steps were taken to give practical effect to the Court's decision. On October 26, 1949, the Department of Justice made public announcement of its intentions concerning the defense of other similar litigation (Appendix G, *infra*). A day earlier it had advised the State Department of such intentions in a letter (copy of which is set forth in Appendix E, *infra*),

in which it indicated willingness to express to the State Department its view as to the litigating position that it would take in the event that a pending application for a passport should be denied and the applicant should thereafter bring suit. This was for the purpose of assisting the State Department in reaching its determinations, under the *Murakami* case, as to whether or not a particular applicant should be regarded as a citizen. By its letter of November 29, 1949 (a copy of which is set forth in Appendix F, *infra*), the State Department indicated that it intends to apply the *Murakami* decision in making determinations of citizenship with reference to the issuance of passports, and will request the views of the Department of Justice with respect to particular applicants. A similar decision has been reached by the Immigration and Naturalization Service where it is called upon to make determinations of citizenship. It is reasonable to assume that like policies will be followed by other Government agencies if and when questions as to the citizenship of renunciants properly come before them.

As indicated by the above-mentioned documents, the direct application of the *Murakami* decision that will be made by the Department of Justice (apart from the activities of the Immigration and Naturalization Service) will have effect only in litigation that the Department is called upon to prosecute or defend. Where a renunciant brings a suit within the jurisdiction of the Court which involves the issue of the

validity of his act of renunciation at a W. R. A. relocation center, and where the Government files do not contain evidence of disloyalty to the United States, the Department will be willing to stipulate that an affidavit by the plaintiff, similar to those introduced by the plaintiffs in the *Murakami* case, may be accepted by the Court as evidence and objection will not be made to the entry of judgment thereon.

Since the decision in the *Murakami* case is technically limited to the cases of *loyal* citizens who renounced due to the conditions mentioned therein, its application could be limited to persons who had been found to be loyal, but who were permitted to go to, or remained at Tule Lake in order to be with family members who had been segregated as disloyals. However, it is believed that the spirit of the decision goes further. For example, the findings adopted as part of the Court's opinion (at 960-961) contain such statements as these:

Several reasons were prominent as to why the evacuees decided to become segregants and to assume the status of individuals disloyal to the United States. They included (a) fear of being forced to leave the centers and to face a hostile American public; (b) a concern for the security of their families; (c) fear on the part of the evacuee parents that their sons would be drafted if the sons did not become segregees; (d) anger and disillusionment, owing to the abrogation of the citizenship rights; (e) bitterness over economic losses brought about by the evacuation. A great many of the people at Tule Lake under the segregation program

also regarded it as a place of refuge where they might remain for the duration of the war.

* * * * *

The segregation program brought together persons who honestly felt an allegiance to Japan and the Japanese Emperor, but it also brought the troublemaker, malcontents, the fractious, the rebellious and frustrated, the draft dodgers, the fanatics, the social misfits, the professional "organizers", the party politicians, the political leaders and their gangs of "goons" and "strong arm" boys.

Accordingly, it was felt that strict application of the decision to the technically loyal would be unduly restrictive and not in accord with the rationale of the decision. For this reason the Department is willing to take the same action in the case of a segregee, who, for example, gave a negative answer to the loyalty question in order to go to Tule Lake for one of the above reasons, as in the case of a technically loyal renunciant, provided that his affidavit satisfactorily explains the matter.

The nature of the affidavits which, it is believed, will be satisfactory in this regard, is described in the above-mentioned letter to the State Department (Appendix E, *infra*). It will be noted that the Department of Justice is willing to consider proposed stipulations with respect to affidavits even of those renunciants who were members of pro-Japanese organizations. Of course, such cases will be scrutinized carefully, and it is most unlikely that the Department will be willing to forego oral testimony and cross-examination where there is any indication of voluntary

activity in promoting the purposes of such organizations. While, necessarily, the affidavit procedure will have no bearing on the cases of the renunciants involved in the present appeal if the decision of the District Court is ultimately affirmed, it will, of course, be equally available to them in the event that it becomes appropriate to take evidence as to their individual cases.

The clear implication of the letter from the State Department (Appendix F, *infra*) is that it will follow the same policies as those of the Department of Justice in reaching its determinations of citizenship in passport proceedings. Particular attention is invited to the last sentence of the letter which announces that the procedure mentioned will have application to renunciants who apply for American passports in this country as well as to renunciants who apply for documentation as American citizens abroad. This clearly means that the mere fact of a renunciant's return to Japan will not necessarily bar administrative relief which otherwise would have been available. Whether and to what extent other agencies of the Government will fall in line with these policies, or will have occasion to do so, is, of course, not known at the present time.

It necessarily follows from what has been said that the appellants do not now urge upon the Court any position inconsistent with its decision in the *Murakami* case or out of harmony with the administrative policies which have been adopted pursuant thereto.

II. Questions presented

Stated generally the questions are:

1. Whether the Court below had jurisdiction over the cause as to certain of the plaintiffs and certain of the defendants, and whether its judgment was in excess of its authority.

2. Whether the plaintiffs proved a *prima facie* case, and if so, whether the defendants' offers of proof were properly rejected as insufficient.

3. Whether the Renunciation Statute (8 U. S. C. § 801 (i)) authorized renunciation of citizenship by persons eighteen years of age and older.

4. Whether the Court below committed reversible error in any of the respects mentioned in the specification of errors, *infra*, pp. 31-55.

III. The nature of the case

In view of the appellants' acceptance of this Court's decision in the *Murakami* case, as dispositive of the issues relating to the potentially coercive character of the so-called general conditions that prevailed at the Tule Lake segregation center and its familiarity with the factual background of the case, it is believed sufficient at this point briefly to summarize the facts which constitute the historical context of the present controversy. If the Court feels that a more comprehensive statement of such facts is necessary, it is respectfully referred to the consolidated brief for the appellants in the cases of *Clark v. Inouye* (175 F. 2d 740) and *Acheson v. Murakami* (176 F. 2d 953), Nos. 11839 and 12082 in this Court, at pages 9 through

26, in which event the Court is requested to treat such statement as having been incorporated in this brief by this reference.³

A description of the effect of the evacuation orders, and the losses and hardships thereby imposed upon the evacuees, is contained in this Court's decision in the *Murakami* case (176 F. 2d at pp. 954-955). (See, also, T&N,⁴ pp. 1-23.) Most of the evacuees were required to report to assembly centers from which they were transported to the W. R. A. relocation centers. Certain aspects of the living conditions at one of these centers, i. e., that at Tule Lake, are described in the *Murakami* case (Id., pp. 955-957). (See, also, T&N, pp. 24-52.)

Evacuees located in such centers were not permitted to leave them except pursuant to leave clearance procedures (described by the Supreme Court

³ The statement in the appellant's brief in *Inouye* and *Murakami* cases, as shown therein, is based largely upon a book entitled THE SPOILAGE and upon W. R. A. publications, which constitute parts of the present record (see R. 413 and the stipulation and order concerning certain unprinted record material entered in this Court on July 6, 1949). Referred to also in that statement are the affidavits of Burling and Hanky, which are included in the present record (R. 147, 324). Other affidavits and materials there referred to will be found to be quite similar to the materials in the present record insofar as they relate to the so-called general conditions under which the renunciations occurred. The principal differences between the evidentiary materials in those records and this consist in the absence in the present record of documents, transcripts of hearings, and affidavits bearing upon the individual renunciations of the plaintiffs herein.

⁴ As in the consolidated brief in the *Inouye* and *Murakami* cases, this reference is to the book by Dorothy J. Thomas and Richard Nishimoto entitled THE SPOILAGE referred to in the last preceding footnote.

in the case of *Ex parte Endo*, 323 U. S. 283, which struck down such procedures as illegal where applied to persons whose loyalty to the United States had been determined). In order to facilitate leave clearances the W. R. A., early in 1943, entered into a joint project with the War Department (which was interested in obtaining data upon which to recruit combat teams of American citizens of Japanese ancestry to serve with the Armed forces) under which all evacuees 17 years of age and over were ordered to execute registration forms in which male citizens were asked:

Question 28: Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and/or all attack by foreign or domestic forces and foreswear any form of allegiance or obedience to the Japanese Emperor, or any other foreign government, power, or organization?

Female citizens were asked:

Question 28: Will you swear unqualified allegiance to the United States of America and foreswear any form of allegiance or obedience to the Japanese Emperor, or any other government, power, or organization?

Numerous evacuees gave negative or qualified answers to this question or refused to answer it. (See T&N, pp. 53-83.)

On July 15, 1943, the W. R. A. designated the Tule Lake relocation center as the facility for the segregation of "those persons of Japanese ancestry residing in relocation centers who by their acts have indi-

ated that their loyalties lie with Japan during the present hostilities'' (T&N, p. 85).⁵

The persons required to go to or remain in Tule Lake comprised all evacuees falling into any of three categories (W. R. A. Manual, Chap. 110, § 110.3.1A-C, Appendix B, *infra*), as follows:

I. Applicants for repatriation or expatriation to Japan. (The defendants herein offered to prove that of the 4,315 plaintiffs in the present appeal 1,444 actually went to Japan voluntarily where, presumably, they now are, and that 2,420 others applied for repatriation or expatriation to Japan prior to their renunciation.)⁶

II. Persons who refused to answer or gave negative answers to Questions No. 28, quoted above, and

⁵ Chapter 110 of the W. R. A. Administrative Manual, relative to segregation, is set forth in full in the appellants' consolidated brief in the *Inouye* and *Murakami* cases, Nos. 11839 and 12082 in this Court, as Appendix C. The portions of the regulations relative to classifications of persons required and permitted to go to or remain at Tule Lake as a segregation center are set forth also in Appendix B to this brief.

⁶ See analysis of defendants' offers of proof Appendix I, *infra*. No break-down is given as to the reasons for segregation of persons who later went to Japan. It is probable that some of them did not apply for repatriation or expatriation prior to segregation. For example, many of the 284 plaintiffs listed in Exhibit VI may have gone to Tule Lake not as segregees but as family members and they thereafter may have gone to Japan for similar reasons. In all, 4,698 American-born evacuees are said to have been segregated at Tule Lake because of repatriation or expatriation requests. THE EVACUATED PEOPLE, p. 169. (Copies of this W. R. A. publication were lodged with the Clerk for use by the Court in consideration of the *Inouye* and *Murakami* cases, *supra*.)

who had not changed their answers prior to October 6, 1943, except those who changed their answers thereafter and satisfied the project director that the changes were *bona fide*. (The defendants offered to prove that 271 of the plaintiffs who remained in the United States fell in this category.)⁷

III. Persons denied leave clearance on grounds relating to security risk. (The defendants offered to prove that 23 plaintiffs who remained in the United States fell in this category.)⁸

Members of the immediate families of persons in the above categories I-III were permitted to go to or remain in the Tule Lake center with them if they wished to do so. (It may be inferred from the defendants' offer of proof that, presumably, 66 plaintiffs who remained in the United States fell in this category.)⁹

No person thus transferred to or remaining in the Tule Lake center could be granted leave clearance directly from the center but provision was made for transfers from the center to other centers, from which leave clearances could be obtained. Persons denied such transfers could file appeals with the Board of

⁷ See footnote 6 above. In all, 3,274 American-born evacuees are said to have been segregated at Tule Lake in classification II. (*The Evacuated People*, p. 169.)

⁸ See footnote 6 above. 348 American-born evacuees were segregated at Tule Lake in this category (*The Evacuated People*, p. 169).

⁹ See footnote 6 above. This classification, obviously, composed largely of children too young to register (see *The Evacuated People*, Table 432, p. 107) included 4,080 American-born evacuees (*Id.*, p. 169).

Appeals for leave clearance (W. R. A. Manual, Chap. 110, sec. 110.9.1-2).¹⁰

The conditions encountered by the segregees at Tule Lake have been described in this Court's decision in the *Murakami* case, *supra*, and were characterized as "worse than penitentiary conditions" (p. 958). About half of the American-born population, over 15 years of age, at Tule Lake, were Kibei (T & N, p. 370), many of whom were "permanently pro-Japanese. They were the American-born but educated in Japan" (176 F. 2d, at p. 958). (The defendants offered to prove that 2,024⁴ of the plaintiffs had received their formal education in Japan. Appendix A, *infra*.) As found in the *Murakami* case, in addition to the segregees who went to Tule Lake for security reasons or because of bitterness due to losses and disillusionment produced by the evacuation program "the segregation program brought together persons who honestly felt an allegiance to Japan and the Japanese Emperor, but it also brought the troublemakers, the malcontents," etc. (176 F. 2d, at pp. 960-961). "From the 'Kibei' and the disaffected Nisei came the powerful organization of pro-Japanese" at Tule Lake "with their bitter opposition to the loyal Nisei, leading to the fighting, beatings and reputed murder of a loyal American described in" the findings of the District Court in the *Murakami* case (Id., p. 958). (The defendants offered to prove that 225¹⁶ plaintiffs were

¹⁰ See footnote 5, *supra*.

leaders of such organizations. See analysis of offers, Appendix A, *infra*.)

The renunciation statute was enacted on July 1, 1944 (8 U. S. C., § 801 (i)). The pro-Japanese organizations immediately made renunciation a focal point of their policy (T. & N. 310, 326) and hundreds of requests for renunciation were received by the Department of Justice prior to December 18 of that year (R. 164). On December 17, the Western Defense Command announced the imminent rescission of the exclusion orders and on the following day the Supreme Court handed down its decisions in the *Korematsu* and *Endo* cases.¹¹ The WRA immediately announced its decision to force resettlements by liquidation of relocation centers within a year (see T. & N. 333-334).¹² On December 20, the WRA leave-clearance provisions were abolished (The Evacuated People, p. 25).

On Tuesday, December 26, 1944, approximately 2,000 pieces of mail were received in the Department of Justice from Tule Lake indicating a desire to renounce citizenship (R. 171).

¹¹ In *Korematsu v. United States*, 323 U. S. 214, the Court upheld the constitutionality of the exclusion orders. In *Ex parte Endo*, 323 U. S. 283, it struck down the WRA leave-clearance procedures as applied to an admittedly loyal citizen of the United States.

¹² The spoilage incorrectly gives the date of the WRA announcement as December 17. This announcement actually occurred on December 18, 1944. (See Annual Report of the Secretary of Interior for the fiscal year ended June 30, 1945, pp. XXXVIII, 275.)

The Attorney General's regulations establishing the procedures to be followed under the renunciation statute (9 Fed. Reg. 12241) are set forth in Appendix H, *infra*. The hearings provided for by such regulations were given first to known leaders of pro-Japanese organizations who were removed as promptly as possible thereafter to Department of Justice alien enemy internment camps. The first contingent was moved out on December 27, 1944 (T. & N. 339), and the last large group was so removed on March 4, 1945 (T. & N. 357). In the meantime, on January 24, 1945, the Department of Justice published an open letter to the pro-Japanese organizations condemning their activities and ordering them to cease (T. & N. 356). Also, on January 29, WRA gave assurances that "those who do not wish to leave the center at this time are not required to do so and may continue to live here or at some similar center until January 1, 1946" (T. & N. 356; see, also, R. 200-201). Notwithstanding these measures those applicants for renunciation who had not yet been afforded hearings persisted in renouncing (R. 129) and those who had done so took no steps to stay the Attorney General's ultimate approval or to request cancellation thereof until long afterwards (R. 191-192).

In October 1945 (see R. 206), the Department of Justice took jurisdiction over the Tule Lake center

and, in effect, conducted it as an alien enemy internment camp (see R. 95-96, 128). This action was commenced on November 13, 1945 (R. 56), on behalf of approximately 1,400 persons presently named as plaintiffs herein while they were so interned under alien enemy removal orders (R. 95-96, 128). Between November 25, 1945, and February 23, 1946, numerous renunciants elected to and did sail for Japan notwithstanding their opportunity to seek release after mitigation hearings.¹³ (The defendants offered to prove that, in all, 1,444 plaintiffs voluntarily went to Japan after renouncing. See Appendix I, *infra*.)

Early in 1946, the Department of Justice conducted mitigation hearings (see R. 57-61, 86-87) which resulted in the cancellation of the removal orders applicable to and in the actual release of all but 300 plaintiffs herein (see Appendix I, *infra*); 2,556 of the present plaintiffs were not named as parties to this suit until after they had been so released (see p. 25, *infra*).

IV. The proceedings below

The original complaint herein (R. 2-56), which was brought on behalf of more than a thousand persons of Japanese ancestry, prayed for an order cancelling and declaring null and void their renunciations of citizenship; requiring their release from internment at Tule Lake; and commanding the cancellation of

¹³ The Evacuated People, a Quantitative Description—a WRA Publication, p. 196. See note 6, *supra*.

removal orders outstanding against them under the Alien Enemy Act.¹⁴

On December 31, 1945, and again on January 2, 1946, stipulations and orders were filed (R. 57-60) reciting that the Department of Justice was about to commence mitigation hearings with reference to the removal orders which would afford the plaintiffs and other renunciants an opportunity to show cause why they should not be deported to Japan pursuant thereto, and provided that the appearance of the plaintiffs at the hearings should neither operate as a waiver of their rights nor prejudice their position in the action.¹⁵ On March 14, 1946, a stipulation and order was filed (R. 86-87) which provided that "the plaintiffs in this suit who are not released from custody * * * and who shall be transferred, in custody, for the convenience of the Government, to an internment camp or place of restraint other than" Tule Lake "will be produced before the above-entitled Court for hearing or trial purposes."

Pursuant to a motion of defendants (R. 89-91) the District Court entered an order on July 10, 1946 (R. 92),

¹⁴ On the same day it was ordered that certain minors named as plaintiffs in the complaint might appear by a guardian *ad litem*. (R. 56.)

¹⁵ On January 2, 1946, a stipulation and order extended defendants' time within which to answer, plead or move, to February 2, 1946 (R. 61). On March 4, 1946, plaintiffs filed a pleading supplementing and amending the complaint (R. 62-85), pursuant to a stipulation (R. 85-86) signed for the Attorney General and United States Attorney by an Assistant United States Attorney as "Attorneys for Defendants," which provided "that service thereof be deemed to have been made on defendants."

striking certain allegations of the complaint and dismissing the original complaint and a supplement thereto (R. 62-86), but gave the defendants 20 days within which to amend. The amended complaint (R. 92-123), praying for substantially the same relief was filed August 15, 1946. An Assistant United States Attorney, on behalf of the Attorney General and United States Attorney, as "Attorneys for Defendants," signed an admission of service "by each of the defendants" (R. 122-123). The following day certain parties defendant were substituted for original defendants (R. 123-124) pursuant to stipulation (R. 124-125) signed in like fashion on behalf of the defendants.¹⁶ On September 23, 1946, the defendants, Tom C. Clark, Attorney General, Frank J. Hennessy, United States Attorney, and Irvin F. Wixon, District Director of the Immigration and Naturalization Service, filed their answer to the amended complaint (R. 126-138), asserting among other things "that no defendants other than themselves have been effectively served herein and none has appeared, and therefore any allegations with respect to such individuals are not relevant to the cause herein set forth" (R. 127).¹⁷

¹⁶ On September 19, 1946, the United States Attorney, on behalf of the defendants, moved to strike certain matters from the amended complaint (R. 125).

¹⁷ On September 30, 1946, an order was entered appointing guardian *ad litem* as to certain additional plaintiffs alleged to be mentally incompetent; receipt of which was signed by an Assistant United States Attorney, on behalf of the Attorney General and United States Attorney, as "Attorneys for Defendants" (R. 138-139) and on October 10, 1946, a motion to strike certain matters from the answer was filed on behalf of the plaintiffs (R. 139-142).

At this juncture the parties filed cross motions for summary judgment (R. 142-146; 146-147).¹⁸ These motions were supported by affidavits which comprise the largest part of the printed record herein (R. 147-408).¹⁹

The District Court, not having reached decision on the merits on the cross motions for summary judgment, the parties on October 10, 1947, entered into a stipulation (R. 408 (a)-(b)) closing proofs and submitting the case for decision on the merits on the basis of the record as it then stood, with provision, however, that if the Court deemed it necessary for a proper decision of any factual or legal issue or issues as to any plaintiff or plaintiffs the Court might order the production of further or additional evidence thereon and, in such an event, the parties should have

¹⁸ Acknowledgment of receipt of plaintiffs' motion was similarly signed by an Assistant United States Attorney on behalf of the Attorney General and United States Attorney as "Attorneys for Defendants" (R. 143-144) as were numerous subsequent acknowledgments, special reference to which will not hereafter be made.

¹⁹ Interspersed between the affidavits in the printed record are an order joining additional parties as plaintiffs dated November 18, 1946 (R. 221-222); a praecipe filed on behalf of plaintiffs requesting the Clerk to note defaults on the part of two defendants, Raymond R. Best, Project Director, Tule Lake Center, and Dillon S. Myer, Director of the War Relocation Authority, stating that each of them had entered an appearance but had failed to file a responsive pleading (R. 222); a statement on behalf of plaintiffs of objections and exceptions to affidavits filed by defendants (R. 318-324); plaintiffs' objections and exceptions to evidence, motion to strike same, and motion to suppress evidence illegally obtained (R. 397-401); and a consent and order reassigning the case from Judge St. Shure to Judge Goodman (R. 402).

the same rights in respect of introduction of such further or additional evidence as to any such plaintiff or plaintiffs as they would have had if they had not entered into the stipulation. The Court so ordered on the same day (R. 408 (b)).²⁰

On April 29, 1948, the District Court entered an opinion and order (R. 410-427) holding (at R. 426) that upon "the basis of the class showing made by plaintiffs, equity and justice require the entry of an interlocutory decree cancelling the renunciations and declaring plaintiffs to be citizens of the United States." The Court, however, further held and ordered as follows (R. 426-427):

It may be that if the defendants were to go forward with further proof, they could present evidence that certain of the plaintiffs individually acted freely and voluntarily despite the present record facts. Therefore, it is further ordered that defendants may have 90 days from date hereof within which to file a designation of any of the plaintiffs concerning whom they desire to present further evidence. As to any plaintiff, not so designated by the defendants within the time specified, a final decree may enter. As to any plaintiff designated in the manner and within the time specified, further hearings, after notice duly given, will be held.

Following this opinion and order, numerous additional plaintiffs were joined in the suit and extensions of time were granted for the filing of the designation

²⁰ On the same day the District Court entered an order correcting the names of certain parties pursuant to stipulation (R. 409).

of plaintiffs as to whom the defendants wish to introduce additional evidence.²¹

On July 27, 1948, the defendants filed a motion to dismiss the action as to 609 named plaintiffs, who had become parties to the suit subsequent to the cancellation of their removal orders and consequent release from custody, upon the ground that they were not, as of the time of joining the suit, being deprived of any right or privilege of citizenship by any of the defendants within the meaning of 8 U. S. C. 903, and that no case or controversy over which the Court had jurisdiction had been shown to exist between them and any of the defendants. On August 16, 1948, the District Court entered its order denying this motion.²² Thereafter the Court entered orders over the opposition of the defendants permitting the joinder of 1,947 additional plaintiffs, making a total of 2,556 persons permitted to become parties to the suit after they had been released from custody pursuant to the mitigation hearings above mentioned.²³ These additions brought the total number of plaintiffs to 4,315.

²¹ The stipulations and orders permitting the joining of additional plaintiffs were omitted from the printed record. Orders extending the time for filing of the designation appear at R. 427-428.

²² This motion, the ~~defendants'~~ ^{plaintiffs'} opposition thereto on the ground that the Attorney General's approval of plaintiffs' renunciations constituted a denial of the rights of citizenship, etc., and the Court's order of August 16, 1948, denying the defendants' motion to dismiss, have been omitted from the printed records. Copies of the motion and supporting affidavit, with most of the names deleted, are set forth in Appendix D, *infra*.

²³ The Court's order of August 23, 1948, joined 1,797 additional plaintiffs; its order of September 20, 1948, joined an additional

On September 27, 1948, the District Court entered an interlocutory order, judgment and decree (R. 430-437) which held, in effect, that all plaintiffs not designated by the defendants for the introduction of additional evidence were to be deemed to be citizens of the United States and granted full relief and that the defendants should have the burden of proof as to all issues concerning those that they did designate. This order granted the defendants an additional 120 days within which to file such designation.

Thereafter on January 25, 1949, the District Court entered an order extending the defendants' time in which to file its designation until February 25, 1949 (R. 438). As shown by the affidavits of counsel for both the plaintiffs and the defendants herein, this order was entered after a conference between them and the District Judge at which the nature of the designation to be filed by the defendants was discussed.²⁴

138 plaintiffs; and its order of September 27, 1948, joined an additional 12 plaintiffs. These orders, the motions upon which they were based, and the oppositions thereto have been omitted from the printed record. On the last mentioned date the Court entered also an order discharging the guardian *ad litem* as to the minor plaintiffs who had reached their majority (R. 429).

²⁴ The portion of the affidavit of Wayne S. Collins, Esq., bearing upon this subject is set forth at R. 449. The understanding of Paul J. Grumbly, Esq., as to the conference is shown in an affidavit by him and in a letter written by him to the Attorney General the day after the conference which are set forth in Appendix B to this brief, *infra*. (This affidavit and copy of the letter are omitted from the printed record pursuant to a stipulation and order of this Court filed herein on July 6, 1949, permitting these papers, which are exhibits to the defendants' return to the Court's order to show cause, to be referred to without printing.)

Although there is dispute as to the representations made by defendants' counsel at the conference, it may fairly be inferred from the record that the District Judge expressed a hope that the Department of Justice, in designating plaintiffs for additional proof, would do so with a view to the interests of justice and the crowded condition of the trial calendar of the District Court. We believe that it may not properly be inferred, however, that the District Judge intimated that his opinion and order of April 29, 1948, *supra*, and his interlocutory order of September 27, 1948, *supra*, might not properly be understood by the defendants as rulings to the effect that, on the evidence as it then stood, the plaintiffs had made out a *prima facie* case casting the burden upon the defendants to come forward with additional evidence in respect of all plaintiffs as to whom the defendants felt that they could make out a reasonable defense.

The defendants' designation of plaintiffs as to whom they wished to introduce additional evidence (Appendix A, *infra*)²⁵ was filed herein on February 25, 1949 (see R. 442). This designation was forwarded to the United States Attorney from the Department of Justice at Washington with a letter

²⁵ Pursuant to the stipulation and order filed in this Court on July 6, 1949, the above-mentioned designation of plaintiffs was omitted from the printed record. It is set forth in Appendix A to this brief, *infra*, in full with the exception that most of the names of the plaintiffs have been deleted with bracketed notations as to the omissions. Included, also, within the brackets, are references to certain changes thereafter made by supplemental pleadings which were necessitated by the fact that the survey upon which the designations were based was not complete as of the time that the filing of the designation was required.

dated February 23, 1949, which was brought to the attention of the District Court,²⁶ which, in effect, pointed out that while the designation included the vast majority of the plaintiffs named in the suit, that did not necessarily mean that all such individual cases had to be tried. The designation (Appendix A, *infra*) grouped the plaintiffs in categories as to which offers of proof were made and suggested that "in scheduling cases for trial, it should be remembered that a final judicial determination of the case of one plaintiff listed in a particular exhibit attached hereto, may prove dispositive of the cases of all or most of the plaintiffs listed in the same exhibit; therefore, it is probable that much time and effort will be saved by postponing the trial of all but one or two cases listed in a particular exhibit until after final judicial action has been taken in the cases selected for trial." The accompanying letter pointed out that two appeals in such cases were then pending in this Court (*Clark v. Iuouye*, 15 F. 2d 740; *Acheson v. Murakami*, 176 F. 2d 953) and instructed the United States Attorney to assure the District Judge that

in our view, at least as strong a case can be made out for sustaining the validity of the renunciations here as was made in the cases now on appeal from the decisions of the District

²⁶ Pursuant to the above-mentioned stipulation and order filed in this Court on June 27, 1949, this letter also has not been printed but appears in Appendix B to this brief, *infra*, as an exhibit to the defendants' return filed March 7, 1949. This letter is quoted in part in the Court's order of March 23, 1949, at R. 456-457.

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Court for the Southern District of California. In view of that fact and in view of Judge Goodman's opinion in the instant cases, the Attorney General feels that he cannot properly concede that the renunciations of any of the designated plaintiffs were involuntary as a matter of fact or law. He, of course, reserves the right to take a different position in the event that the decisions now on appeal should be sustained." (R. 456-457.)

The letter, in effect, also suggested that insofar as the cases of designated plaintiffs would probably be covered by the decision of the cases then pending on appeal, it would be desirable, as a practical matter, to avoid trials until such decisions had been reached. It was further suggested that, indeed, it was within the realm of possibility "that the final decisions of the cases on appeal will render any further proceedings unnecessary" (ibid.).

On February 28, 1949, the plaintiffs filed a motion to strike the designation of plaintiffs (R. 442-444) and the Court entered an order requiring the defendants to show cause why the same should not be stricken (R. 439-440).²⁷ Thereafter, the defendants

²⁷ On March 4, 1949, there were filed a stipulation and order discharging guardian *ad litem* as to plaintiffs who had become adult during the pendency of the suit (R. 451-452) and an order appointing a guardian *ad litem* as to certain plaintiffs expressly conceded in the designation to have been mentally incompetent and as to whom no evidence would be introduced (R. 453). On March 21, 1949, a stipulation and order were filed amending the complaint and pleadings to substitute the names of certain officers for the names of their predecessors as parties defendant (R. 454).

filed their return (Appendix B, *infra*) and supplemental return (Appendix C, *infra*) to the Court's order to show cause.²⁸ On March 23, 1949, the District Court entered its order striking the defendants' designation of plaintiffs (R. 455-460).

On April 12, 1949, the District Court entered its findings of fact and conclusions of law (R. 460-480) and its final order, judgment and decree herein (R. 481-484). On April 26, 1949, the defendants filed their notice of appeal (R. 488) and a motion to suspend the injunctions granted in the Court's judgment during the pendency of such appeal (R. 485-486). In such motion the defendants pointed out that 1,480 plaintiffs (in both cases) are now in Japan and under the terms of the injunction might return to the United States if the injunction was permitted to operate while the appeal was pending. On May 2, 1949, the Court entered its order modifying the final order, judgment and decree (R. 498) by providing that it would not affect the exercise of the authority and powers conferred upon the Secretary of State and his representatives "pursuant to 8 U. S. C. 903 with respect to persons abroad claiming United States nationality or citizenship."

Subsequent to the defendants' filing of their notice of appeal (R. 488), certain of the plaintiffs filed voluntary dismissals in this cause. A supplemental

²⁸ These pleadings are omitted from the printing pursuant to the stipulation and order filed in this Court on July 6, 1949, *supra*.

record including these dismissals has been requested from the Clerk of the District Court, and this Court is requested to take notice of them in connection with certain contentions hereinafter advanced in this brief.

Specification of errors relied upon

The District Court erred:

1. In entering its opinion and order herein on April 29, 1948 (R. 410-427), which, in effect, held that on the basis of the evidence then before the court "equity and justice require the entry of an interlocutory decree cancelling the renunciations and declaring plaintiffs to be citizens of the United States" (R. 426), and in holding and ordering therein that in order to avoid such decree it would be necessary for the defendants to designate plaintiffs as to whom it would introduce additional evidence (R. 426-427).^{28a}
2. In entering its interlocutory order, judgment and decree herein on September 27, 1948 (R. 430-437),

^{28a} This ruling was erroneous in that the plaintiffs had introduced no evidence tending to prove that *all* renunciations at the Tule Lake Segregation Center were involuntary products of the coercive influences found to have existed at that center, nor had they introduced any evidence tending to prove that their individual acts of renunciation were coerced. The Court's conclusion (R. 426) that the "government of the United States under the stress and necessity of national defense, committed error in accepting the renunciations of the greater number of the plaintiffs herein," even if true, was an insufficient reason for holding that all the plaintiffs were to be presumed to have renounced their citizenship involuntarily unless the defendants produced evidence to the contrary.

for the reasons above mentioned and for the further reason that the court thereby expressly placed upon the defendants "the burden of proof * * * to prove that the renunciation of each such plaintiff * * * was wholly voluntary, uncoerced, and uncompelled and was of the free will, choice, desire and agency of such plaintiff and was neither caused by nor affected by the duress, menace, coercion, intimidation, fraud, or undue influence in which he or she was held and subjected to" (R. 432).^{28b}

3. In entering its order striking defendants' designation of plaintiffs herein on March 23, 1949 (R. 455-460), wherein the Court found that the offers of proof made in the defendants' said designation and supplemental pleadings (see Appendix A-C, *infra*) by which the defendants offered to introduce the documents and transcripts of hearing concerning the individual renunciations of the plaintiffs, all tending to prove that the renunciations were of their own free will and accord and were desired by them, and further to introduce documentary evidence tending to prove that actions taken by plaintiffs which were consistent with voluntary renunciation of their citizenship, had

^{28b} It was improper to shift the burden of proof to the defendants negating allegations made by plaintiffs as to which no direct evidence, and certainly not the best evidence, had been introduced. Particularly is this true since the issue concerned the individual state of mind of the particular plaintiffs, as to which the defendants could produce, at best, only circumstantial evidence.

no "competency, relevancy, or materiality to any issue or any bearing on any issue not heretofore decided by this Court or to any new issue of fact or proof against a plaintiff or plaintiffs; that the "general offer of proof" contained therein relates to and covers offered matters of proof or factual issues which heretofore were considered and decided by this Court in favor of the plaintiffs and against the defendants" (R. 457-458).^{28c}

4. In entering its findings of fact and conclusions of law herein on April 12, 1949 (R. 460-480) in that the same do not comply with rule 52 (a) of the Federal Rules of Civil Procedure, either in form or substance.^{28d}

^{28c} This order was erroneous for each of the reasons set forth in paragraphs 1 and 2 above and for the further reason that in practical effect it amounted to a decision that one seeking judicial relief from the consequences of his own actions upon the ground that they were coerced need prove only that there were coercive influences which might have compelled his action but without introducing any evidence tending to prove that they actually did so.

^{28d} The Court did not find the facts specially but instead found that various numbered paragraphs of pleadings contained true or false statements, which statements can be ascertained only by actually turning to the pleadings, and interweaving into such findings statements of fact, or in such a way that it is impossible to ascertain from a reading of the findings alone the facts believed by the Court to sustain the judgment herein. Such findings, which were prepared by the plaintiffs herein (see R. 459), are in such form as to place a serious and unnecessary burden upon the District Court and upon this Court, and therefore to lead to doubt that they represent an adequate expression of the convictions of

5. In its finding of fact No. 1 as to the first cause of action (R. 461) and in finding No. 1 at (R. 468), to the effect that it had jurisdiction to entertain the suit by virtue of the provisions of Title 28, U. S. C., § 41 (1) [now § 1331], 8 U. S. C., § 903 and 28 U. S. C., § 400 [now § 2201], in that the same are conclusions of law, and, if they be deemed findings of fact, for each of the reasons stated in Point I of the Argument, *infra*.

6. In its findings No. 1 at (R. 461) and No. 2 at (R. 478), that defendants other than Clark, Hennessy, and Wixon appealed so as to authorize the entry of judgment against them, for each of the reasons set forth in Point I of the Argument, *infra*.

7. In its findings No. 1 at (R. 461) and No. 3 at (R. 469) that each of the plaintiffs was at the time of the institution of suit and prior thereto a loyal citizen of the United States; that none is an alien enemy or citizen or subject of Japan and that the revocation, by Major General H. Pratt, of the Civilian Exclusion Orders, was an official executive finding that none of these plaintiffs was hostile or dangerous to the United States; and declaring that any finding by the Attorney General to the effect that any of such plaintiffs have been or were dangerous to the

the District Court. Cf. *United States v. Forness*, C. A. 2, 125 F. 2d 928. Such findings are further defective in that they are confusing, repetitious and frequently immaterial. They are moreover replete with legal conclusions and extravagant and misleading phraseology. Cf. *Brooks Bros. v. Brooks Clothing* (S. D. Cal.), 5 F. R. D. 14.

United States is not true. These findings are erroneous in that they beg the legal question herein and are immaterial if plaintiffs, in fact, are citizens. If such plaintiffs, as were dual nationals prior to their renunciations are held to have renounced effectually, and are therefore alien enemies, the Court was without authority to review the determination of the Attorney General, pursuant to the Alien Enemy Act, that such plaintiffs were dangerous. With reference to the conclusion that the revocation of the Civilian Exclusion Orders constituted a finding that plaintiffs were not hostile or dangerous, the finding is erroneous for the further reason that such revocation plainly was not such a finding, no evidence tends to prove that it was intended so to be, and the finding is contrary to the evidence (see R. 196-198; *The Spoilage*, p. 334 n). Furthermore, the defendants offered to prove herein that most of the plaintiffs were segregated at the Tule Lake Center because they had applied for repatriation or expatriation to Japan previously or had given a negative answer or refused to answer a question as to their loyalty to the United States, or had been denied leave clearance for security reasons; and that while there, many of them had been leaders and members of pro-Japanese organizations and that many, subsequent to renunciation, had voluntarily gone to Japan (see Appendix I, *infra*).

8. In its findings No. 2 at (R. 461) and No. 5 at (R. 469-470), that plaintiffs were excluded and detained

solely because of their Japanese lineage and in violation of their rights, liberties, privileges, and immunities as citizens of the United States; and that the government thereby falsely branded them as disloyal and wrongfully attempted to repudiate them as citizens. These findings are primarily erroneous in that they constitute conclusions of law. Moreover, the findings are contrary to the decision of the Supreme Court of the United States in the case of *Korematsu v. United States*, 323 U. S. 214, 223.

9. In its findings No. 3 at (R. 461-462) and No. 6 at (R. 470-471) and Nos. 2 and 3 at (R. 476) that the renunciation hearings were wanting in fairness and impartiality and deprived each plaintiff of due process of law; and that despite the fact that the purpose of the hearings was to ensure against involuntary renunciation of citizenship, that none of the plaintiffs understood the consequences of their acts and none renounced voluntarily; that parties were held and subjected to duress by the government, its agents, and the defendants, which duress was incidental to the duress of terroristic groups and individuals operating at Tule Lake, all of which was known to the Attorney General and his hearing officers at such time; and that each plaintiff in executing his or her renunciation and in attending and being subjected to such hearings was not a free agent but was acting involuntarily under compulsion of governmental

duress or private duress which was an incident thereto. Having concluded that the renunciation hearings were not required by law, the Court rendered its criticism of them immaterial. The findings insofar as they relate to involuntary action on the part of each of the plaintiffs are plainly erroneous. There is no evidence of record to the effect that *none* of the renunciations was voluntary. While there is ample evidence to indicate that a number of the renunciations were influenced by factors rendering them involuntary within the meaning of this Court's decision in the case of *Acheson v. Murakami*, 176 F. 2d 953, there is a complete lack of evidence that any individual named as a plaintiff in this cause actually renounced his citizenship involuntarily as a consequence of any such influences. Such finding could be sustained only upon evidence that *all* renunciations at the Tule Lake Center were involuntary and no evidence so indicates; the opinion of the District Court is expressly to the contrary (R. 415, 422, 426-427) and the defendants offered to prove that many of the plaintiffs were pro-Japanese group leaders, some of them Kiebi, who voluntarily repatriated to Japan after renouncing their citizenship, at the close of hostilities, and, moreover, that a number of plaintiffs were not even at the Tule Lake Segregation Center when they renounced their citizenship (see Appendix I, *infra*).

10. In its findings No. 4 at R. 462 and No. 7 at R. 471 that each of the plaintiffs was held in duress by the defendants, for the reasons stated in paragraph 9 just above.

11. In its findings No. 5 at R. 462 and No. 8 at R. 471 that there was a complete lack of constitutional authority for United States administrative, executive, and military officers to detain the plaintiffs; that they were held in duress and subjected to duress when so detained from the time of their evacuation to the time of their release and that said things invalidated and voided each of the renunciations executed by the plaintiffs. These findings are erroneous in that they are primarily conclusions of law and are further erroneous for the reasons stated by the Court below in its opinion (R. 415 (n)). These findings are further erroneous, even assuming the Court's conclusion that the plaintiffs were unlawfully detained, and that any renunciation while under unlawful detention is void, for the further reason that the record plainly shows that most renunciations occurred after the decision of the Supreme Court in the case of *Ex parte Endo*, 323 U. S. 283, and after the lifting of any restraint upon their departure from the centers and no evidence shows that any of the plaintiffs renounced his citizenship or even applied to do so prior to the lifting of such restraints. (While it may be assumed that most of the plaintiffs who were pro-Japanese organization leaders applied to renounce prior to December 20, 1944, it does not necessarily

follow that all of them did so since the evidence indicates that new leaders were selected to replace old ones as soon as the old ones were permitted to renounce and were removed to alien enemy internment camps. (See e. g., *The Spoilage*, p. 340 *et seq.*)

12. In its finding No. 1 at R. 463 reiterating by reference its findings 1 through 4 (R. 461-462) for the reasons heretofore given with reference to such earlier findings.

13. In its finding No. 2 at R. 463, its amplification of findings at R. 466, and in its finding No. 2 at R. 472 that the renunciation of each plaintiff was neither free nor voluntary but was compelled and was coerced, was caused by and was a direct and approximate result of the duress in which each plaintiff was held and subjected by the United States Government and the defendants and the incidental concurrent duress, menace, coercion, intimidation, fraud, and undue influence to which each was subjected and which was exerted upon each plaintiff by groups and individual internees likewise detained, for the reasons heretofore set forth in these Exceptions in paragraph 9, *supra*. These findings are substantially repetitious of the findings there discussed.

14. In its findings No. 3 at R. 463 and No. 3 at R. 472-473, the plaintiffs were unlawfully and unconstitutionally imprisoned by the United States Government acting by and through the War Relocation Authority; and the finding that the War Relocation

Authority demanded of the plaintiffs a false admission of prior allegiance to Japan and upon refusal of any of them to make an admission, the incarceration of such persons at Tule Lake for an indefinite period of time; and in holding that the War Relocation Authority falsely branded each plaintiff as disloyal and hostile to the United States; and holding that plaintiffs have been continuously deprived of all their rights of national and state citizenship; that in 1942 it classified plaintiffs as being alien enemies; that because in 1942 plaintiffs were not allowed to perform military service for this nation and because of being fingerprinted and photographed they were led to believe and feared that they would be deported to Japan and that if they did not first relinquish United States nationality, they would be, upon arrival in Japan, mistreated as being persons hostile to Japan; that the War Relocation Authority incarcerated innocent citizens without accusation of wrongdoing in a special jail termed "The Stockade"; and that incarceration of plaintiffs in the stockade was a phase of governmental duress; in holding that the maintenance of a recreation club and its method of operation by the War Relocation Authority where internees worked at a nominal salary was a part of the governmental system of duress; that hearings conducted during January and February of 1946 by the Attorney General for the purpose of determining who should or should not be deported to Japan were arbitrary, unreasonable, and oppressive in character and deprived plaintiffs of due process of law and that

the same constituted a phase of governmental duress; that subsequent to such hearings the War Relocation Authority denied plaintiffs a right to counsel and the posting of censors to listen to consultation with their counsel in connection with this suit was a part of governmental duress; that the War Relocation Authority by allowing groups which the Court held to be terroristic to operate in the center, further subjected the plaintiffs to duress and intimidation which caused the said renunciations; that up until plaintiffs were released from detention the Government permitted aliens to leave the Tule Lake center while it held their children to signed renunciation applications for involuntary removal to Japan and compelled relocated members of their families to a choice of an involuntary exile from the United States to Japan to accompany them to preserve a family unity or to remain in the United States, separated from them. These findings are erroneous in the following particulars:

(a) The finding that plaintiffs were unlawfully and unconstitutionally imprisoned is a conclusion of law.

(b) The finding that WRA demanded of the plaintiffs a false admission of prior allegiance to Japan, etc., presumably relates to Question 28 of the registration form which WRA promulgated in an effort to expedite leave clearances (see p. 14, *supra*) and if so the record certainly contains no justification for this description of that event. Moreover, we submit, that in view of the well known fact that a large per-

centage of Kibei and Nisei were dual nationals and since there was no ready means whereby the government officials could determine which of them did owe allegiance to the Japanese Emperor, it was not unreasonable for them to conclude that they could not forego the portion of the question relating to the foreswearing of allegiance to the Emperor. The implications of the finding are, moreover, contrary to the evidence (see, e. g., T & N 79-81).

(c) The finding that WRA falsely branded plaintiffs as disloyal to the United States presumably refers to their segregation for having previously requested repatriation to Japan, for having refused to swear unqualified allegiance to the United States or, in a few cases, having been denied leave clearance on security grounds (see pp. 14-17, *supra*). If so, the facts, we submit, speak for themselves. See, also, *Korematsu v. United States*, 323 U. S. 214-219, indicating that it was not unreasonable to consider such acts as evidence of disloyalty to the United States.

(d) The finding that plaintiffs were deprived of *all* rights of citizenship is unsupported by the record and, moreover, is refuted by the fact of this and prior litigation. Moreover, as stated above, most renunciations did not occur until after the decision of *Ex parte Endo*, *supra*, and the revocation of the leave clearance procedures and the announcement that the centers would soon be closed.

(e) There is no evidence that plaintiffs were classified as alien enemies by anyone prior to their renunciations.

(f) There is no evidence that *all* the plaintiffs believed that they would be deported to Japan and that if they did not first relinquish United States nationality, they would be mistreated there. The affidavit of Testsujiro Nakamura (R. 235-236) that he talked with in excess of 3,000 persons scheduled for renunciation hearings and that without exception each person repeated to him the identical reasons for renunciation, even if true, does not identify any plaintiff herein as having stated such reasons. Moreover, as stated in *O'Laughlin v. Helvering*, 81 F. 2d 269, 271, " 'it is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment.' * * * [this] testimony * * * is, to speak frankly, wholly unbelievable."

(g) The reference to the "Stockade" in the above findings appears to relate to the statements made in Chapter XI of *The Spoilage*. We submit that neither from this, nor any other evidence of record, can it properly be inferred that "The Stockade" was instituted by WRA to instill in the plaintiffs fear of the Government or that the same was a phase of governmental duress. We submit, also, that no competent evidence supports the finding that WRA incarcerated innocent citizens without accusation of wrongdoing "in the stockade."

(h) The Court's holding that the maintenance and operation of the recreation club at Tule Lake where internees worked at a nominal salary was a part of

the Government's systematic program of duress is not supported by any evidence that the club was a government institution or that any evacuee worked at such club other than on a voluntary basis (see R. 105-106; 131-132).

(i) The holding that the mitigation hearings conducted by the Attorney General (which incidentally resulted in the release of all but 300 of the present plaintiffs) were arbitrary, unreasonable, and oppressive in character and deprived the plaintiffs of due process of law, obviously proceed from the question begging assumption that the renunciations were void and the alien enemy removal orders therefore invalid. Nothing in the record suggests that such hearings were any different from any other alien enemy mitigation hearings, the validity of which has been consistently upheld by the courts. Moreover, since these hearings occurred after the renunciations, the finding is irrelevant.

(j) The findings that WRA denied plaintiffs their right to counsel and posted censors to attend and listen to consultation between plaintiffs and their counsel in connection with this proceeding are contradictory. Moreover, since they relate to a time subsequent to the renunciations they are irrelevant.

(k) The finding that *all* plaintiffs were influenced to renounce their citizenship by the activities of the pro-Japanese organizations at Tule Lake finds no support in the record and moreover the defendants alleged (R. 136) and offered to prove that numerous plaintiffs were, themselves, leaders and members of

such organizations and, indeed, that a number of the plaintiffs were not even at Tule Lake at the time of their renunciations (Appendix A, *infra*).

(1) The finding that the Government made it a practice to permit aliens to leave Tule Lake center and return to their former homes in this country while holding their children who had signed renunciation *applications*, if literally intended, we submit, proves too much for the plaintiffs. Regardless of fears of hostility of the Caucasian population outside the centers, we suggest that it would be a strange child that would persist in renouncing his citizenship in these circumstances. If the finding was intended to mean that some renunciants were held after their parents had been released, it is obviously irrelevant since such fact could have had nothing to do with renunciation.

15. In its findings of fact No. 4 at R. 463 and No. 2 at R. 472, and in its amplification of findings at R. 467, in finding that the plaintiffs were led to believe and fear that the signing of renunciation applications was a matter of demand by the government, compliance with which was a prerequisite to their right and that of their families to remain united and remain in the protective security of said center pending such banishment; in finding that *all* plaintiffs thought renunciation was necessary to save themselves and their families from physical harm and violence which was reigning in civilian communities hostile to persons of Japanese ancestry; and finding that by reason of

governmental duress and duress of organized terroristic groups plaintiffs were kept in a state of hysterics and terror and deprived of their freedom of will and choice in signing their applications for renunciations and in finding that the plaintiffs were compelled by the Government to sign a fictitious renunciation of citizenship against their will and desire. No evidence supports these findings as to *all* these plaintiffs, nor does any evidence support such findings as to *any* individual plaintiff herein. In view of our acceptance of this Court's decision in the *Murakami* case, we do not suggest that the activities of pro-Japanese groups and the fears of the hostility of the Caucasian population outside of the centers had no influence upon the renunciations of many evacuees. However, there is abundant evidence that other factors accounted for many renunciations (see Point II of Argument, *infra*). The incredible nature of the affidavit of *Nakamura* (R. 235-236), which will apparently be relied upon in support of these findings has been commented upon in paragraph 14, *supra*. Moreover, even that affidavit falls far short of proving that all plaintiffs were so affected.

In any event, the defendants offered to prove that the majority of the plaintiffs applied for repatriation to Japan prior to their segregation at Tule Lake, that many of them were pro-Japanese organization leaders and that some of them were not even at the Tule Lake Center when they renounced their citizenship (see Appendix A, *infra*).

16. In its findings of fact No. 4 at R. 467, No. 4 at R. 473, No. 4 at R. 477 and in its amplification of find-

ings at R. 467, in finding that pro-Japanese organizations at Tule Lake engaged in spreading pro-Japanese nationalistic propaganda in a terroristic manner with full knowledge and consent of government authorities, namely, the WRA; and that a large number of plaintiffs asserted their belief in the principles of and purposes of such organizations before the renunciation hearing officers as a result of governmental and individual duress. While it was admitted (R. 132) that WRA permitted the operation of Japanese language schools and cultural activities therein and that some of the organizations and leaders thereof were adherents of Japanese philosophy, there is no evidence that WRA had full knowledge of and consented to alleged terroristic methods used by such organizations to induce renunciations. It is, of course, true that many of the plaintiffs asserted their loyalty to Japan and the adherence to the principles of the pro-Japanese organizations when they appeared before the renunciation hearing officers. However, no evidence in this record supports a finding that any individual plaintiff that made such representations did so falsely, or because he was afraid not to do so. The defendants have offered to prove that many of the plaintiffs were pro-Japanese organization leaders (Appendix A, *infra*) and, certainly, any such finding as to them would be absurd.

17. In its findings of fact No. 4 at R. 463, and No. 4 at R. 473, and No. 4 at R. 476-477, in finding that pro-Japanese organizations at Tule Lake threatened all renunciants prior to renunciations; that the United

States Government regarded them as alien enemies and that it had scheduled them and their families for deportation to Japan; the government by announcement prior to the renunciation hearings in 1945 threatened the deportation of each party and that of alien members of his or her family on an exchange ship; that the pro-Japanese organizations threatened all the plaintiffs that if any of them succeeded in being relocated in civilian walks of life in this country their lives would be placed in jeopardy because of community prejudice; that the pro-Japanese organizations coerced all the plaintiffs into signing the renunciation applications by threatening against their lives and by threats of inflicting great physical injury upon them and members of their families in the event that he or she failed to obey their mandate to sign such renunciation applications. There is no evidence of record that *all* the plaintiffs to this suit or that any individual plaintiff in this suit believed the propaganda of such organizations nor that such organizations by threats forced *all* of the plaintiffs or any individual plaintiff in this action to renounce his citizenship. Moreover, as previously stated, the defendants offered to prove that many of the plaintiffs were pro-Japanese organization leaders and that some of them were not at the Tule Lake Center at the time of their renunciation (Appendix A, *infra*).

18. In its findings No. 4 at R. 463-464 and No. 5 at R. 473-474, that although it did not consider and

give weight to the letter of Abe Fortas as a pleading herein, the statements contained in said letter were true and correct. If this finding is intended to incorporate the language of the letter as a finding of the Court, it is more temperate, we submit, than some of the previous findings but equally erroneous for the same reasons. If the finding is intended to invoke the letter as evidence, we submit that it is plainly hearsay (see R. 194-195) and thus excluded by stipulation (R. 408-a).

19. In its findings No. 4 at R. 463 and No. 2 at R. 472, that each plaintiff renounced his citizenship unwillingly because of threats of terroristic groups to do physical harm to him or his family which threats compelled him to renounce, for the reasons stated in paragraph 17 of these specifications, *supra*.*

* This finding appears to be based upon the affidavit of Nakamura, at R. 236-237, which has been commented upon, *supra*. Upon close examination it will be found that the affidavit does not state that affiant was told that threats were actually made against persons with whom he talked if they did not renounce, but rather that such persons told him that they would be subjected to violence by the pressure groups which had previously threatened them in a different connection. Apart from the inherent incredibility of this long recital attributed to each of more than 3,000 persons, as above pointed out, there is the additional fact that not one of the plaintiffs is identified as a person that made any such statement to the affiant. While there is indication that resort was had to violence and threats by the pro-Japanese organizations in connection with elimination of opposition to their activities and in the solicitation of membership, so far as we have been able to ascertain there is no evidence whatsoever in this record that any renunciant was actually threatened with violence if he failed to renounce his citizenship. The evidence is to the contrary (R. 189, 191-192, 396).

20. In its findings No. 4 at R. 463 and No. 6 at R. 474, and set forth in its amplification of findings at R. 467-468, that the United States Government and its agents in charge of the Tule Lake center, and the Attorney General and his agents, were aware of the duress, menace, fraud, coercion, and intimidation of all the plaintiffs by the pro-Japanese organizations but condoned the same and actually aided and abetted the same. Insofar as WRA is concerned, the objection to this finding is set forth in paragraph 16 of this specification, *supra*, to which reference is respectfully made. Insofar as the Attorney General and his representatives are concerned the finding is absurd.*

Moreover, as stated by the Supreme Court in *Bilokumsky v. Tod*, 263 U. S. 149, 153-154, "silence is often evidence of the most persuasive character." We submit that had any of the plaintiffs actually been threatened with physical violence if he did not renounce, there would be no difficulty in finding clear evidence of that fact in the record.

* It is clear from the record that the Department of Justice had no knowledge as to the existence of the pro-Japanese organizations until December 5, 1944 (R. 163-164, 165-166). It immediately proceeded to consider the applications for renunciation of the leaders of the organization for the purpose of removing them to alien enemy internment camps in order to cause the organizations to be dissolved (R. 168-170). The leaders were removed to an alien enemy camp on December 27, 1944 (R. 180; T. & N. 339). The organization leaders were immediately replaced by new officers (R. 180) and intensified their nationalistic activities and issued copious propaganda literature (T. & N. 340). On January 24, the Department of Justice published an open letter to the organizations condemning their activities and ordering them to cease (T. & N. 356). On January 26, the second group of organization officers was removed

21. In its finding No. 4 at R. 463, No. 7 at R. 474, and No. 5 at R. 477, that each of the plaintiffs and all renunciants, as a direct and proximate result of governmental duress and private duress, renounced his and their citizenship, for the reasons hereinabove often reiterated that there is no evidence that any of the plaintiffs renounced his citizenship for either of such reasons and there is abundant evidence that many renunciations were for different reasons, e. g., loyalty to Japan (T. & N. 340-341).*

22. In its finding No. 4 at R. 463, in its amplification of findings at R. 466, in its finding No. 8 at R. 474, and in its finding No. 6 at R. 279 in reiterating that each of the plaintiffs renounced because of duress, menace, fraud, and undue influence; in finding that as to the number of plaintiffs who did not attempt to retract their renunciations until after the atom bomb fell on Japan, the knowledge of such fact was not a positive factor in their said retractions. As

(T. & N. 356) which removals continued through March 4, 1945 (T. & N. 357) when the last of those considered by the Department of Justice to be troublemakers were interned (R. 191). These three removals included the entire membership of the militant young men's organization (R. 183). There is no evidence in this record to the contrary. This finding is clearly erroneous.

* Moreover, the defendants have offered to prove that most of the plaintiffs applied for repatriation to Japan prior to the renunciation at Tule Lake (Appendix A, *infra*) and the District Court itself has stated its opinion that fear "that they would be subject to reprisals on arrival in Japan" if they did not renounce, was a factor which led to renunciations (R. 416). The fear of deportation mentioned in the Court's opinion could hardly have been a factor in the thinking of those who were actively seeking repatriation.

to the Court's findings of duress, menace, fraud, and undue influence, reference is made to the reasons set forth in paragraph 21 just above and in earlier paragraphs. The record contains no evidence concerning the effect of the explosion of the first bomb upon the thinking of the renunciants beyond the fact that very few had written to the Department of Justice indicating a desire to withdraw their renunciations prior to that event (R. 192). No evidence supports the Court's finding denying the inference that may properly be drawn from that fact.

23. In its finding No. 5 at R. 464 and No. 9 at R. 474, in concluding that the Attorney General had power to accept revocations of renunciations, the said renunciations having been void, illegal, and invalid, for the reason that such finding is clearly a conclusion of law and for the further reason that the renunciation statute (8 U. S. C., § 801 (i)) plainly does not confer any such authority on the Attorney General.*

* The fact that the Attorney General may decide that a renunciation was void in connection with a proceeding in which it is his administrative duty to determine the question of a renunciant's continued citizenship, just as a court has such power when a case or controversy properly presents such an issue to it, does not confer upon the Attorney General any more than it does upon a court the authority to set aside the prescribed consequences of an Act of Congress. True, the Attorney General was authorized to prescribe the forms and procedures whereby the renunciations could be accomplished. Also, the renunciations could not be effective until he approved them as not contrary to the interests of national defense. We believe that he had the authority to refuse to take this action upon any purported renunciation which in his opinion was not voluntary because, in order to be constitutional, the statute could only require such action in cases of voluntary renunciations. However, once his approval was given, his authority was expended under the Act.

24. In its finding No. 1 at R. 464, for the reasons heretofore set forth with respect to the Court's earlier finding referred to in such finding.

25. In its finding No. 2 at R. 464-465, in No. 1 at R. 475, and in No. 7 at R. 477-478, that several hundred plaintiffs were under legal disability of infancy; that those plaintiffs appearing by a *guardian ad litem* or next friend herein because mentally incompetent at the time they signed their applications for renunciation, did not have sufficient mental capacity to accomplish a legally binding act. Except as to the eight plaintiffs named therein, there is no evidence to support any holding that any of the plaintiffs were mentally incompetent to renounce their citizenship. It is true that the Attorney General approved the renunciations of persons 18 years of age and older and it is clear that the above finding is therefore erroneous for the reason that it constitutes a conclusion of law that such renunciations were not permitted by the statute on the part of persons under 21 years of age. As to this legal issue see Point II of the Argument, *infra*.

26. In entering its conclusions of law herein (R. 478-480) as follows: that the Court had jurisdiction over the cause and over the persons of each of the plaintiffs and each of the defendants, for the reasons set forth in Point I of the Argument, *infra*; in effect, that each of the plaintiffs renounced his citizenship involuntarily and therefore continues to be a citizen of the United States, and entitled to the

rights, privileges and immunities of such citizenship, for each of the reasons set forth in the numbered paragraphs of this Specification and in the Argument, *infra*; and that each of the plaintiffs is entitled to an injunction against each of the defendants, for the reasons set forth in paragraph 27 immediately below.

27. In entering its final order, judgment, and decree herein on April 12, 1949 (R. 482-484), holding that the renunciations of citizenship by each of the plaintiffs is void, that each is a citizen of the United States, and in enjoining each of the defendants, their agents, servants, employees, and representatives from interfering with the enjoyment of rights and privileges of such citizenship. The erroneous nature of this judgment as it relates to the Court's authority to issue it against particular defendants and in favor of the particular plaintiffs, and the failure of the record herein and the findings of fact and conclusions of law to support the judgment have been and will hereinafter be discussed. While we submit that the judgment should be reversed completely for the reasons heretofore and hereinafter stated, in the event that the Court should conclude that the judgment should not be reversed, we respectfully submit that the judgment is erroneous in that it enjoins a number of the defendants from performing acts which they have never threatened to perform and in all likelihood will never have occasion to perform. It is axiomatic that equity will not extend its relief beyond the needs of the case and particularly should this be true of the conduct of federal courts whose judicial power extends only

to actual cases or controversies. Moreover, we submit, it should not be assumed that mandatory relief will be needed if the declaration, that plaintiffs continue to be citizens, is sustained.

SUMMARY OF ARGUMENT

I. Plaintiffs relied upon § 503 of the Nationality Act of 1940 (8 U. S. C. § 903) and upon Title 28, U. S. Code §§ 1331, 1332 (conferring general jurisdiction), and §§ 2201, 2202 (Declaratory Judgment Act) in instituting this action. As to plaintiffs now remaining under alien enemy removal orders, jurisdiction is conceded insofar as the action is against the Attorney General. As to the plaintiffs who were joined after their release pursuant to the revocation of such orders, § 503 clearly did not furnish jurisdiction, since they were not then being denied a claimed right of citizenship. *Clark v. Inouye*, 175 F. 2d 740. As to plaintiffs who became parties while they were interned, but thereafter were released, jurisdiction disappeared as a consequence of the elimination of a case or controversy within the reach of the judicial power of the United States. As to the two latter groups, for the same reason, jurisdiction does not exist under the other statutes relied upon. Moreover, neither the general jurisdictional provisions nor the Declaratory Judgment Act conferred upon the District Court authority to entertain actions against any of the defendants officially residing outside of the territorial limits of the State of California, and in answering the complaint (as he was required to do under Section 503, *supra*) the Attor-

ney General did not impliedly subject himself to the exercise of any additional powers that the Court might have under them. The other out-of-State defendants did not consent to the jurisdiction of the court in any respect.

II. The ultimate ruling of the District Court amounts, in effect, to a decision that any person who renounced his citizenship while at a WRA Relocation Center is conclusively to be presumed to have renounced unwillingly. Even if the Court's ruling be construed as raising a *prima facie* presumption in favor of the invalidity of such renunciations, it is erroneous because no evidence was introduced tending to prove either that *all* the plaintiffs, or that *any* identified plaintiff, renounced as a result of the influences held by this Court in *Acheson v. Murakami*, 176 F. (2d) 953, to be coercive in nature. In any event the Court erred in placing upon the defendants the burden of proving that plaintiffs' renunciations were not coerced, or in holding, in effect, that the offers of proof made by the defendants were insufficient to off-set the *prima facie* presumption of coercion as the case may be.

III. The District Court erred in ruling that those plaintiffs who renounced their citizenship when they were over 18 but under 21 years of age, lacked mental capacity to do so, and in holding that the Nationality Act of 1940 as amended (8 U. S. C. § 801 (i)) did not authorize them to do so. The express terms of that Act and its legislative history clearly indicate that the Congress intended to lower the age of competency from 21 to 18 years generally, where acts of

acquisition or relinquishment of citizenship are concerned. In amending that act to authorize the renunciations of citizenship here in question, the Congress did so with implied reference to the legislative policy thus established. The Attorney General, who prepared the amendment, and the regulations thereunder, has so interpreted the Act. His views, accordingly, are entitled to great weight.

ARGUMENT

I

Except as to certain plaintiffs the court lacked jurisdiction over the cause and over the defendants and it lacked authority to extend the full relief granted

Paragraph I of the amended complaint herein (R. 93) asserted to the District Court that it had “original jurisdiction to entertain the suit by virtue of the provisions of Title 28, U. S. C. A., sec. 41 (1) [now §§ 1331, 1332], Title 8, U. S. C. A., sec. 903, and Title 28, U. S. C. A., sec. 400 [now §§ 2201, 2202].” In its first finding of fact (R. 461) the District Court found that the allegations of that paragraph “are true and correct.” However, in its conclusions of law (R. 478) the District Court merely made the following finding with reference to its jurisdiction:

1. The Court has jurisdiction over the cause and over the persons of each of the plaintiffs and of each of the defendants.

To this statement should be added the following excerpt from the Court’s opinion (R. 425):

There is adequate power in equity to right the wrong done to the plaintiffs—a wrong in-

herent in the objective of Section 801 (i) and demonstrated by the admitted circumstances of renunciation. This judicial power has never been expressly limited nor circumscribed nor has the domain in which it functions been precisely bounded. 30 C. J. S. 387 *et seq.*

This portion of the brief will take up the question of jurisdiction with reference to each of the cited statutes commencing with 8 U. S. C., § 903.

1. *Section 503 of the Nationality Act of 1940, 54 Stat. 1171 (8 U. S. C., § 903).*—To the extent relevant to the present discussion this section is as follows:

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States.

It was averred in paragraph IV of the amended complaint (R. 95) and admitted in the paragraph IV of the answer (R. 128), that as of the time of the commencement of the suit the District Director of the Immigration and Naturalization Service for the Northern District of California, acting under the direction of the Attorney General, had custody over the plaintiffs who were interned and held under order

of removal from the United States issued by the Attorney General pursuant to the Alien Enemy Act of 1798, and the Presidential proclamations and the regulations of the Attorney General relative thereto. It may here be conceded that such allegation brought the Attorney General within the above-quoted statute because the plaintiffs were by this time claiming a right to be released as nationals of the United States, which right was being denied by the Department of Justice upon the ground that they were not nationals of the United States. It was believed by the Attorney General that loss of their United States citizenship was essential to their internment under the Alien Enemy Act (Cf. R. 159).

However, later events raise serious questions as to the jurisdiction of the District Court under the statute where the majority of the present plaintiffs are concerned. As stated, *supra*, only 300 plaintiffs remain under alien enemy removal orders (see Appendix I, *infra*); 2,556 plaintiffs have become parties to the suit since the revocation of the removal orders applicable to them and their consequent release from custody (see p. 25, *supra*); and the remaining plaintiffs, who were original parties to the suit, have similarly been released from custody since it was commenced. The 300 plaintiffs, as to whom the removal orders have been continued in effect, were released from custody as a consequence of the District Court's decision in No. 12195, now pending in this Court, and in the event of ultimate reversal of that order and of the judgment of the District Court in the present cause, presumably custody over them will be resumed. In that

event, unless the removal orders are administratively revoked, they will be removed to Japan in accordance therewith. Accordingly as to these plaintiffs jurisdiction in the District Court to entertain the action against the Attorney General under Section 503 of the Nationality Act of 1940, must be conceded.

No such concession, however, can be made as to the other groups of plaintiffs mentioned. Their cases will be discussed in the order named.

(a) The cases of the 2,556 plaintiffs, who became parties to this action after they had been released from custody pursuant to revocation of the alien enemy removal orders applicable to them, are, we believe, indistinguishable from the cases of the appellees in *Clark v. Inouye*, 175 F. 2d 740, decided by this Court on June 23, 1949. In that case the court concluded its opinion with the statement:

Here, in the absence of any facts constituting such a denial either in the complaint or in the proofs, the restricted jurisdiction of the District Court has not been invoked.

While it is true that the amended complaint in the present case does allege that all the plaintiffs are being held under removal orders, and no such allegation was made in the *Inouye* case, it is believed that no valid distinction can be based upon that circumstance. The allegation in the present amended complaint was true as to the plaintiffs then named therein when made. However, it was no longer true at the time that the plaintiffs now in question were permitted to become parties to this suit. There was no implied admission on the part of the defendants

that such fact was true because the defendants filed a motion to dismiss the 606 plaintiffs who had thus become parties to the suit as of the time of the motion (see Appendix D, *infra*) and the additional 1,950 plaintiffs now in question were made parties to the suit thereafter by order of Court over the objection of the defendants (see p. 25, *supra*).

In any event, if in these circumstances the pertinent allegation of the complaint should be regarded as speaking as of the time of the joinder of these plaintiffs, the allegations were not admitted but rather were denied by the defendants' motion and by its subsequent objections to the joinder of additional plaintiffs. In that view the trial court clearly erred in entering judgment on behalf of these plaintiffs without taking testimony on the issue. Particularly is this true in view of the defendants' offer of proof that as to all plaintiffs other than the 300 mentioned above and those who had voluntarily gone to Japan, no plaintiffs were under removal orders of the Attorney General (see Appendix A, *infra*).

Accordingly we submit that as to the 2,556 plaintiffs who became parties to this suit after their release from internment pursuant to revocation of their removal orders, the District Court lacked jurisdiction under Section 503 of the Nationality Act.²⁹

²⁹ There is, moreover, further jurisdictional difficulty under Sec. 503 as to plaintiffs who were not original parties to the suit. That action requires a plaintiff thereunder to institute his action "in the District Court of the United States for the District of Columbia or in the district court * * * for the district in which such person claims a permanent residence." The amended com-

(b) With reference to the plaintiffs who were parties to the suit prior to the revocation of their removal orders but who were thereafter released pursuant to their revocation, the question is somewhat more difficult. While the jurisdictional fact was admitted in the Attorney General's answer, the facts in that regard thereafter changed and in effect were brought to the Court's attention by the defendants' offer of proof mentioned above. It is true that no motion was made in this regard by the defendants. However, the Court's order on the defendants' motion with reference to the plaintiffs joined in the

plaint avers (R. 94, that "each plaintiff * * * is a resident of the Northern District of California" and such allegation is admitted by the answer (R. 127), presumably because that was true of all plaintiffs who were parties at that time. However, the jurat of the complaint can hardly extend to parties later joined, nor can the admission of the answer be held to include the numerous plaintiffs joined over defendants' protest as to whom no further pleading was filed. The additions to the suit now bring the total number of plaintiffs to 4,315, which constitutes the vast majority of the 5,371 evacuees who renounced their citizenship. It would be a remarkable coincidence that the Northern District of California, from which considerably less than half of the evacuees came and to which still fewer returned (see *The Evacuated People*, pp. 46-49) should have provided almost all of those who renounced their citizenship. The answer, of course, in all probability is that many of them have been permitted to join who are not residents of the District and who have not even been required to make representations in that regard.

In these circumstances, since the defendants could not collusively confer jurisdiction on the District Court by admitting an untrue jurisdictional averment (see *Clark v. Inouye, supra*) it would seem that their inadvertent failure below to challenge the jurisdiction of the District Court upon this ground should not deprive this Court of authority to inquire into the matter and take appropriate action thereon.

action after their release, clearly discloses that any such motion would have been futile and the Court, in the circumstances then obtaining, might reasonably have regarded it as an unwarranted delaying tactic. Moreover, as this Court pointed out in the *Inouye* case, "though the answer admit the jurisdictional facts, jurisdiction may be contested by a showing of its collusive acquisition." Since this is so, it seems plain that the duty would have devolved upon this Court to inquire into the change in jurisdictional facts, which are well within its judicial notice, even if such change had not been pointed out in the defendants' offers of proof. Cf. *Southern Pacif. Co. v. McAdoo*, C. A. 9, 82 F.2d 121.

The question presented here is, of course, whether or not jurisdiction once validly acquired under Section 503 of the Nationality Act, in an action instituted by a person then claiming and being denied a right or privilege as a national of the United States upon the ground that he is not a national of the United States, is lost thereafter by the granting of such right or privilege upon another ground; in this case, release from internment and revocation of removal orders upon the ground that plaintiffs are no longer to be regarded as dangerous alien enemies. In this connection it may be conceded that the literal language of the statute does not divest the court of jurisdiction thereunder, once properly acquired. When the conditions in question are met the plaintiff "may institute an action"; but nothing is said concerning the jurisdiction of the Court to continue with the cause thereafter. Accordingly it

would seem that the answer must be found by reference to more general authority; in this case, the Constitution itself.

It is clear that the judicial power of the United States created by Article III of the Constitution can operate only upon cases and controversies within the meaning of that article. *Federation of Labor v. McAdory*, 325 U. S. 450, 461. Here, no more than in the *Inouye* case, can the plaintiffs have reason to fear future denial of rights or privileges of nationality. In any event "claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324-325. Here, moreover, it is clear that appellees have no reason to fear a future invasion of their claimed rights by that officer. Cf. *Eccles v. Peoples Bank*, 333 U. S. 426, 434-435. Accordingly, when a case or controversy disappears from an action, that action becomes moot and must be dismissed. Cf. *Mills v. Green*, 159 U. S. 651. With the disappearance of the case or controversy there obviously exists nothing upon which the judicial power of the United States can operate.

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The foregoing contentions with reference to the jurisdiction of the District Court in the action insofar as it is against the Attorney General, of course applies *a fortiori* to the other defendants named in the cause, because neither the pleadings nor the facts developed in the proceedings below disclose that at the

time of the commencement of the action, or at any later time, has there been denied to any plaintiff a claimed right or privilege as a national of the United States, which right was denied by any department or agency of which any one of them is the head, upon the ground that such plaintiff is not a national of the United States. The essence of what has occurred as to them is that the plaintiffs have asserted that they are United States citizens and by bringing this action have challenged them to deny such assertions. (Cf. *F. W. Maurer & Sons Co. v. Andrews*, 30 F. Supp. 637 (E. D. Pa.)). As to these defendants this Court's decision in the *Inouye* case requires a holding that they are not properly within the jurisdiction of the Court under Section 503 of the Nationality Act.

2. *Sections 1331, 1332, 2201, and 2202 of Title 28, United States Code.*—The first two sections mentioned constitute the general provisions for the jurisdiction of the district courts. Prior to the revision and enactment of Title 28 they constituted 28 U. S. C., § 41 (1), relied on by the plaintiffs as conferring jurisdiction upon the District Court. They are as follows:

§ 1331. *Federal question; amount in controversy.*—The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 930, eff. Sept. 1, 1948.)

* * * * *

§ 1332. *Diversity of citizenship; amount in controversy.*—

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between:

- (1) Citizens of different States;
- (2) Citizens of a State, and foreign states or citizens or subjects thereof;
- (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States," as used in this section, includes the Territories and the District of Columbia. (June 25, 1948, ch. 656, § 1, 62 Stat. 930, eff. Sept. 1, 1948.)

Sections 2201 and 2202 of Title 28, U. S. C., embody the so-called Declaratory Judgment Act, in its present form. These provisions were relied upon by plaintiffs and cited under their former designation as 28 U. S. C., § 400. They are as follows:

§ 2201. *Creation of remedy.*—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. (June 25, 1948, ch. 646, § 1, 62 Stat. 964, eff. Sept. 1, 1948.)

* * * * *

§ 2202. *Further relief.*—Further necessary or proper relief based on a declaratory judgment

or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. (June 25, 1948, ch. 646, § 1, 62 Stat. 964, eff. Sept. 1, 1948.)

The considerations advanced with reference to Section 503 of the Nationality Act, in regard to the original plaintiffs to this action who have been released pursuant to the revocation of their removal orders since the action was instituted, underlie the absence in this case of "actual controversy" requisite to the granting of relief under the Declaratory Judgment Act quoted just above. Indeed, the decision of this Court in the *Inouye* case may constitute authority that neither that Act nor the general jurisdictional provisions relied upon by the plaintiffs herein, furnished the District Court with jurisdiction in this action. In that case the District Judge was not content to rely upon Section 503 of the Nationality Act and invoked *sua sponte* the Declaratory Judgment Act in aid of his jurisdiction. The question as to the applicability of that Act was briefed and argued to the Court but no notice thereof was taken in the Court's opinion. However, the judgment of the District Court was reversed for lack of jurisdiction. If the *Inouye* case does stand for the proposition that the Declaratory Judgment Act did not confer jurisdiction upon the District Court in that case, it would seem that it also stands for the proposition that the District Court equally lacked jurisdiction under 28 U. S. C., §§ 1331 and 1332, because had there been an actual controversy within the jurisdiction of the Court under

the last mentioned sections, there would automatically have been "a case of actual controversy within its jurisdiction" within the meaning of those words as used in § 2201, *supra*. Accordingly, it seems appropriate to discuss all of these sections together.

Against the possibility that the reversal in the *Inouye* case as to the Declaratory Judgment Act was based upon some error other than its lack of applicability to an action of this sort, it is deemed necessary further to discuss the matter.

As amply shown above there must necessarily be a case or controversy within the meaning of Article III of the Constitution before the judicial power of the United States can be exercised. Here, except as to the 300 plaintiffs subject to the Attorney General's removal orders, no action is being taken or threatened by him, and, insofar as is shown in the pleadings and facts of record, no action is being taken or threatened by any other defendant as to any of the plaintiffs, in deprivation of their rights. There are not here, as there were in *Perkins v. Elg*, 307 U. S. 325 (in which the issuance of a declaratory judgment concerning an issue of nationality, was approved), threats of imminent deportation outstanding (see 307 U. S. at 328). In the circumstances of that case, there was a case or controversy which, in absence of the Declaratory Judgment Act, would have made appropriate the exercise of the traditional injunctive powers of a court of equity; hence, the issuance of the declaratory judgment was in aid of such powers and the Act was properly invoked in respect of "a case of actual controversy within" the court's jurisdiction. Here, however, there is no occa-

sion for judicial intervention and, in fact, none is permitted. The plaintiffs find themselves in the disadvantageous position of having signed formal written renunciations of United States citizenship. Unless such renunciations were invalid, they have lost their former nationality. This, however, is not by fiat of the Attorney General but by act of Congress—8 U. S. C. 801 (i). In short, except as to the plaintiffs under removal order, there is no present controversy between plaintiffs and the Attorney General. *A fortiori*, there is no controversy between the plaintiffs and the other defendants.

We submit that the Congress approached the limit of its Constitutional power in enacting Section 503 of the Nationality Act of 1940, *supra*. (Cf. e. g., *Musk-rat v. United States*, 219 U. S. 346; *Federation of Labor v. McAdory*, *supra*.) There it is provided that when a *claimed* right or privilege of citizenship is *denied* on grounds of noncitizenship, an action can be brought. The emphasized words demonstrate the existence of controversy. But where, as here, there is no denial, jurisdiction exists neither under Section 503 nor under 28 U. S. C., §§ 1331–1332, or §§ 2201–2202. Cf. *New Jersey v. Sargent*, 269 U. S. 328; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249; *Coffman v. Breeze Corporation, Inc.*, 323 U. S. 316. We so submit.³⁰

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³⁰ It may be suggested, moreover, that Congress by enacting a special Statute—Sec. 503—carefully defining the circumstances in which a declaration of United States nationality may be obtained, did not contemplate or intend that thereafter resort for this pur-

There are, however, further objections to the action of the District Court in entering its judgment, particularly the decree of injunction herein against the Attorney General and the other named defendants.

Admittedly Section 503 of the Nationality Act authorizes the District Court to entertain a suit against the head of an executive department, in his official capacity, regardless of his district of official or personal residence, provided that the terms of the statute are met. That section, like Section 9 (a) of the Trading With the Enemy Act, 50 U. S. C., App. § 9 (a), authorizes suit in the district of plaintiffs' residence only if the action is within the consent of the statute. See *Becker Company v. Cummings*, 296 U. S. 74, 78; *Cummings v. Deutsche Bank*, 300 U. S. 115, 118; Cf. *United States v. Sherwood*, 312 U. S. 584, 586. However, absent such consent a government officer officially residing in the District of Columbia is beyond the reach of the process of courts outside that district. And, obviously, mere acquisition of jurisdiction over an officer in an official capacity pursuant to such consent does not confer jurisdiction over him for purposes other than those for which the consent was given. *Duisberg v. Crowley*, 54 F. Supp. 365, 368 (D. N. J.). Accordingly, even though the court below properly acquired jurisdiction over the Attorney General in his official capacity within the terms of the consent given by Section 503 (except as to plaintiffs who were joined

pose should also be available under other jurisdictional provisions. In this connection it should be noted that *Perkins v. Elg*, *supra*, was decided prior to the enactment of that statute.

in the action after their release), he was before the court only for the purposes of that section, and the court erred in invoking its general equity powers in issuing an injunction against him. Especially is this so where, as here, there is no Congressional consent to suit against him as an officer, except as it may be found in Section 503, with the consequence that the judgment would have to go against him as a person in order to avoid the implication of an unauthorized suit against the United States. Cf. *Philadelphia Company v. Stimson*, 223 U. S. 605, 619-620. For that reason Rule 25 (d) of the Federal Rules of Civil Procedure requires that before a successor to a public office is substituted as a party defendant to an action against his predecessor, it must be shown by supplemental pleading that the successor adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before substitution is made the officer, unless expressly assenting thereto, must be given reasonable notice and accorded an opportunity to object. That the case involves no controversy with the Attorney General as a person seems clear.

The original complaint was brought against the then Secretary of State, the then Secretary of the Treasury, the then Commissioner of the Immigration and Naturalization Service, the then Alien Property Custodian, the then Secretary of the Interior, the then Director, War Relocation Authority, the then Project Director, Tule Lake Center, and the then Officer in Charge, United States Department of Jus-

tice I. & N. Service at Tule Lake (R. 2-3). Thereafter a supplemental pleading was filed by plaintiffs pursuant to a stipulation signed by an Assistant United States Attorney, on behalf of the Attorney General and United States Attorney, as attorneys for the defendants, which provided "that service thereof be deemed to have been made on defendants this fourth day of March" (R. 86). Whether effectual service upon officers of the United States could thus be accomplished in view of Rule 4 (d) (5), F. R. C. P., need not, we believe, be considered here. Paraphrasing the language of the Supreme Court in *Butterworth v. Hill*, 114 U. S. 128, 132, unless "the acceptance of service as indorsed on the writ is to be treated as a voluntary appearance by the *officers* in the court in *California*, without objection to the jurisdiction, the case stands as *it* would if the process had been actually served on them in the District of Columbia by some competent officer." There being no authority in the District Court to cause this process to be served in the District of Columbia, the "parties proceeded, therefore, at their own risk and without the consent of *these defendants* to the jurisdiction of the Court"; hence "the Court was without jurisdiction and had no authority to enter the decree which has been appealed from" (Id., at 133).

Thereafter the plaintiffs filed their amended complaint and obtained a similar acknowledgement of service "by each of the defendants" over the signatures of the "Attorneys for the Defendants." This slight change of phraseology, we submit, does not change the result.

Thereafter a stipulation was entered into between counsel for the defendants and counsel for the plaintiffs agreeing "between the parties hereto" that successors to the offices of the Secretaries of the Treasury and Interior, be substituted in lieu of predecessors as defendants to the case (R. 124-125), and an order of substitution was thereupon entered (R. 123). This stipulation and order did no more, we submit, than place the successors in the shoes of the previous defendants, i. e., name them as parties who could appear and defend the action if they consented to do so. (Indeed, a subsequent similar stipulation merely amended "the amended complaint and pleadings herein * * * substituting the name of" a successor "as a defendant herein in lieu of * * * his predecessor in said office" (R. 454)). Cf. *Grandillo v. Perkins*, 36 F. Supp. 546, 547.

Other stipulations were entered into relative to the proceedings below by "Attorneys for Defendants" one of which was a stipulation and order (R. 61) "between the parties hereto that the defendants herein may have to and including" a certain day "within which to answer or plead to the complaint of plaintiffs herein, or make such motion as he may be advised." It is to be observed as to this particular stipulation that it purports to be between "the parties hereto" as distinguished from "the defendants herein" who were granted such additional time. Accordingly, it may be argued that the defendants who were within the reach of the Court's process, and therefore were parties regardless of their consent to appear and defend, were agreeing that such time extension should

be granted all defendants. However, even assuming that this motion would have constituted a general appearance prior to the adoption of the Federal Rules of Civil Procedure, it is clear that under such rules the distinction between general and special appearances has been abolished. "A defendant * * * is no longer required at the door of a federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within." *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, C. A. 3, 139 F. 2d. 871, 874. The same is of course, true for the motion to strike certain matters from the original complaint (R. 125-126), which likewise was made on behalf of the "Defendants." *Phillips v. Baker*, C. A. 9, 121 F. 2d. 752, 754-756.

In any event, if the plaintiffs had previously labored under the assumption that the named defendants other than Clark, Hennessy, and Wixon had considered to subject themselves to the jurisdiction of the Court, the true situation should have become clear upon the filing of the answer of the defendants just named, which expressly stated (R. 127):

Moreover, the respondents Clark, Hennessy, and Wixon assert that no defendants other than themselves have been effectively served herein and none has appeared, and, therefore, any allegations with respect to such individuals are not relevant to the cause herein set forth.

This, we submit, was the equivalent of an announcement by appearing parties, which, at least the defendant Attorney General should be considered to have been authorized to make on their behalf, that they had not consented "to the jurisdiction of the Court" (*Butterworth v. Hill, supra*). If a general appearance should nonetheless be found to have been entered, we submit, this clear statement in the answer should be regarded as raising the defense of improper venue under the Federal Rules of Civil Procedure. See *Phillips v. Baker, supra*, 755. The answer was in a case captioned in the names of the defendants; the Attorney General was certainly the proper officer to assert the defense in their behalf; nothing in Rule 8 (b) requires that more than one defense be asserted in the answer; and the defense of improper venue may properly be asserted therein. See *Orange Theatre Corp. v. Rayherstz Amusement Corp., supra*.

Certainly, after the answer was filed all signatures by "attorneys for defendants" should be taken to mean the defendants who had appeared in defense of the action and all motions and other matters purportedly filed by "defendants" or "respondents" should be regarded as having been submitted by those defendants who had so appeared. Accordingly, the District Court's finding (R. 469) that "each of the defendants in said cause appeared herein," is actually an erroneous conclusion of law, and the judgment entered by him against the named defendants, other than those who joined in the answer, was clearly erroneous for that reason alone. We so submit.

II

The ultimate ruling of the District Court is clearly erroneous in that under it, in practical effect, all renunciations of American citizenship by evacuees at WRA relocation centers are conclusively presumed to have been involuntary notwithstanding the lack of any evidence that they, individually, were coerced

The original opinion of the District Court herein (R. 410-427) appeared to constitute a ruling that the evidence of the general conditions prevailing at Tule Lake taken together with that relating to the psychological consequences of evacuation and subsequent events, made out a *prima facie* case for the plaintiffs, throwing upon the defendants the burden of going forward with evidence tending to prove that "plaintiffs individually acted freely and voluntarily despite the present record facts" (R. 426). Other expressions in the opinion seemed to indicate that the presumption would be overcome by proving that particular plaintiffs "were members of the pro-Japanese organizations at Tule Lake, who have already been repatriated to Japan in accordance with their express wishes" (R. 415) or by proving that certain plaintiffs "were Kibei who spent their formative years in Japan and were * * * active members of pro-Japanese groups at Tule Lake" (R. 427n).

Accordingly, when the defendants submitted their offers of proof as to particular groups of plaintiffs it was reasonably expectable, we submit, that at least where they offered (Appendix A, *infra*) to prove that certain plaintiffs were Kibei leaders of pro-

Japanese organizations who had repatriated to Japan, they would be permitted to submit such proof. This was true, also, of the offer (*Ibid.*) to prove that other plaintiffs were at WRA relocation centers other than Tule Lake when they renounced. Also, it was clearly possible that the Court would feel that the proof (offered (*Ibid.*)) that the majority of plaintiffs had sought repatriation to Japan prior to their renunciation at Tule Lake, would overcome the *prima facie* presumption, in view of the court's conclusion (R. 416) that a factor leading to decisions to renounce was the conviction that "unless they renounce they would be subject to reprisals on arrival in Japan." Although the Court, after rendering its opinion, entered an order (R. 430-437) placing the burden of proof upon the defendants—erroneously, we have submitted—certainly nothing therein indicated any change in the Court's views as to the nature of the proof of voluntary action seemingly suggested by the opinion. The Court's conclusion, therefore, that none of the offers had "any competency, relevancy or materiality to any issue * * * not heretofore decided by this court" (R. 457) is most difficult to understand.³¹

What evidence the Government possibly could submit to prove that individual plaintiffs "acted freely and voluntarily" beyond introducing the documents and transcripts of the renunciation proceedings, as

³¹ A better picture of the defendant's designation, as it relates to the special offers of proof is set forth in an analytical classification which appears as Appendix I, *infra*.

was done in the *Inouye* and *Murakami* case,³² and which the defendants offered to do in this case (see, Appendix A, *infra*), and beyond showing that individual plaintiffs had received their training in Japan, had participated in pro-Japanese patriotic activities and had voluntarily returned to Japan, we are unable to imagine. Obviously, it would be impossible for the Government to negative any possibility that evacuation and subsequent events had had some influence upon the decisions of such plaintiffs to renounce their citizenship although it is clear that many other factors were influential.³³ Paraphrasing the language of *Kirby v. Tallmadge*, 160 U. S. 379, 383—

as *plaintiffs* had it in their power to explain the circumstances we regard their failure to do so as a proper subject of comment. "All evidence," said Lord Mansfield, in *Blatch v. Archer* (Cowper, 63, 65), "is to beweighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been more satisfactory if the *plaintiffs*, who must have been acquainted with all the facts and circumstances, had given their version of the facts.

If any one of the plaintiffs had brought this action alone, no court, we submit, would have been satisfied with his mere showing of the probability that other renunciants had been coerced. Cf. *Hartsville Mill v. United States*, 271 U. S. 43, 47-49. The burden of

³² This evidence is set forth in the record in No. 11839; see, e. g., the documents relative to *Murakami* at pp. 158-166. The docu-

proof “does not shift with the evidence” (*Commercial Court v. N. Y. Barge Corp.*, 314 U. S. 104, 110) nor should it shift, we submit, because of the number of plaintiffs that may have joined in a suit. The complete lack of evidence in this record tending to prove that *all* plaintiffs, or that *any* individual plaintiff, renounced citizenship involuntarily, is emphasized by the fact that it cannot be inferred from this record with certainty that all or any of the persons named as plaintiffs (except two, R. 31, 75, 122), actually

ments relative to her mitigation hearing and the order releasing her from custody are set forth at pp. 166-168. The nature of the transcripts of hearing of a pro-Japanese organization leader can well be imagined by a reading of *The Spoilage* at p. 333, *et seq.*

³³ According to *The Spoilage*, which was cited with approval by this Court in the *Murakami* case, *supra*, and is of evidence in the present case (see R. 413), the underlying factors and influences that led to many decisions to renounce were as follows:

1. Loyalty to Japan. (T. & N., 340-341. *Cf. Id.* 100-102.)
2. Belief that Japan would win the war and that a pro-Japanese record would be advantageous. (T. & N., 325-326. *Cf. Id.* 98-100.)
3. Assumption that renunciants, who later changed their minds, could escape consequences. (T. & N., 326.)
4. Desire to avoid service in United States armed forces. (T. & N., 326, 339. *Cf. Id.* 317.)
5. Anger and frustration because of prewar prejudice and discrimination against their race, climaxed by hardships and losses incident to the evacuation program. (T. & N., 349. *Cf. Id.* 95.)
6. Fear of public hostility and dread of economic hardships incident to relocating outside of centers at some future date. (T. & N., 345-350.)
7. Desire to remain with members of families who had been or might be interned as dangerous alien enemies and possibly removed or repatriated to Japan. (T. & N., 326, 350-351.)
8. Desire to keep on friendly terms with pro-Japanese acquaintances, neighbors and associates. (T. & N., 351-352.)

desire to resume their American citizenship even today.³⁴

Moreover, the decision of the District Court which, since it appears to place an impossible burden of proof upon the defendant, amounts, we believe, to a ruling that all renunciations by evacuees were

³⁴ The only basis for assuming that the parties named as plaintiffs herein actually desire to have their renunciations set aside is to infer that fact from the presumption that counsel would not have named them as plaintiffs if they had not authorized him to do so. This presumption, which is by no means a conclusive one (*Pueblo of Santa Rosa v. Fall*, 273 U. S. 315, 319), is especially weak in a case such as this, involving more than 4,000 plaintiffs; where counsel could not possibly have become personally acquainted with all of them and therefore probably is not in position personally to vouch for the accuracy of the purported requests upon which he acted. Certainly, in the case of the Kibei who renounced their American citizenship in order to become "true Japanese" (see, e. g., T & N 342) and who thereafter returned to Japan, where they now are, it is possible that they do not now desire to resume their former role of dual nationals.

In this connection it is significant that four plaintiffs have entered dismissals in this cause since the entry of the judgment herein in their favor. (A supplemental record containing such dismissals has been requested and, presumably, will be before the Court by the time this case is argued.) While it must be conceded that these four plaintiffs entered their dismissals herein in order to avoid motions by the Government to dismiss suits that they have pending before the District Court for the Southern District of California, such fact does not allay the suspicion that they had not authorized the inclusion of their names in the present cause. The suits in the Southern District are as follows: *Michiko Takigawa v. Acheson*, No. 8203-WM; *Norio Kiyama v. Acheson*, No. 10303-WM; *Yukiko Nakanishi v. Acheson*, No. 8652-WM; *Yemiko Hamaji v. Acheson*, No. 10095-WM. Three other cases by persons named as plaintiffs herein, which were pending in the Southern District, were voluntarily dismissed after judgment herein and motions filed by the Government upon the ground that they were parties to this cause. Such cases were as follows: *Tetsuo Frank*

coerced and therefore invalid, plainly defeats the congressional purpose in enacting the legislation permitting the renunciations. The legislative history of the renunciation statute³⁵ clearly shows that it was

Kawakami and Isao James Kuromi v. Acheson, No. 8238-WM; *Toshiko Ichikwa v. Clark*, No. 7674-WM; *Iwao Shigei and Hajime Kariya v. Clark*, No. 7769-M. The case of *Yoshiko Yokoi v. Acheson*, No. 9986-M, is still pending there upon the Government's motion to dismiss because the plaintiff is a party to the present cause. These circumstances, we submit, make it clear that it cannot be presumed that *every* person, named as a plaintiff herein, actually seeks or desires restoration of his American citizenship.

³⁵ In the report of the Senate Committee on Immigration upon the bill which became the Act of July 1, 1944 (Report No. 1029, to accompany H. R. 4103, 78th Cong., 2d sess.), the Committee said:

PURPOSE OF THE BILL

The purpose of the bill is completely set forth in a letter of the Attorney General to the chairman of the committee, dated March 15, 1944, quoted under the sub-heading of "General Information" of this report.

* * * * *

The following letter explaining the bill has been received by the Committee from the Attorney General:

* * * * *

The immediate purpose of the proposed legislation is to deal with the problem presented by a group of persons of Japanese descent who are native-born United States citizens but who presumably are, according to the laws of Japan, Japanese nationals, and who assert their loyalty to the Emperor of Japan and their desire to renounce their United States citizenship and to be recognized as Japanese nationals. This group, the members of which have almost without exception been placed in the segregation center at Tule Lake, Calif., by the War Relocation Authority, in various estimated to number between 300 and 1,000 persons.

Under existing law, it is not possible for a national of the United States voluntarily to expatriate himself while within the United States. It therefore is not possible, under existing law, to permit these persons to abandon their United States nationality even though they openly assert loyalty to the enemy. If the law were amended as

primarily enacted in order to make possible the renunciation of the pro-Japanese segregees at Tule Lake in order that they could be treated as alien enemies and ultimately removed to Japan. The District Court said in effect that the mere fact that they were segregees

suggested, the members of the group to which I refer would be enabled to abandon their United States nationality. Since the members of this group may be presumed to be nationals of Japan in accordance with the laws of that country, *the members of this group could thereupon be dealt with as alien enemies under the applicable statutes.* * * * [Italics supplied.]

There is no question that this is an excellent war emergency measure.

The committee, after considering all of the information presented, are of the opinion the bill H. R. 4103 should be enacted into law and it is, therefore, favorably reported.

See also a similar report from the House Committee on Immigration and Naturalization (Report No. 1075, to accompany H. R. 4103, 78th Cong., 2d sess.).

In the Senate the bill was considered by unanimous consent and passed (90 Cong. Rec. 6617). In explaining the purpose of the bill (Ibid.) Senator Russell said:

In this country there are many persons of the Japanese race who really possess a dual citizenship. They were born in this country and have American citizenship. Many of them have been back in Japan, and they really feel that their allegiance is to the Emperor of Japan. We are now detaining those people in relocation centers. Under the bill, if they apply voluntarily to divest themselves of their American citizenship they will be taken out of war relocation centers and interned as enemy aliens. We should certainly provide a method which would permit such Japanese to divest themselves of American citizenship if they really owe allegiance to the Japanese Emperor.

The reason I have asked to have the bill considered at this time is that we are hopeful that a number of Japanese will take advantage of the procedure outlined in the bill so that we may offer them to the Imperial Government of Japan in exchange for American citizens who are now being held in territory occupied by the Japanese.

See, also, the references to the legislative history of this Act in the appellants' brief in *Barber v. Abo*, No. 12195 in this Court, at pp. 28-30.

at Tule Lake renders void even the renunciations of those who have been transported to Japan and those as to whom alien enemy removal orders are still outstanding, but as yet unexecuted due to this and companion litigation. It thus deprives the Act of its intended effect, even though the Government is in a position to prove that many plaintiffs were in the pro-Japanese group that the legislation was intended to reach.

We submit that the legislative purpose of a valid statute should not be defeated by the courts, regardless of their views concerning the wisdom or morals of the measure involved. We further submit that the District Court plainly erred on the merits in entering its judgment herein and that the judgment should be reversed.

III

The Attorney General properly approved renunciation by persons 18 years of age and older

The District Court, in its findings as to the answer to the amended complaint relating to the third cause of action, found as a "fact" that "several hundred of the plaintiffs were laboring under the legal disability and incompetency of infancy at the time they signed their respective applications for renunciations and renounced United States nationality" (R. 475). This question was briefed and argued to this Court in *Clark et al. v. Inouye et al.*, 175 F. 2d 740, but this Court, in reversing the District Court on jurisdictional grounds, did not decide the question. It was administratively decided by the Attorney General that

renunciations could only be executed by persons 18 years and over and such practice was followed with respect to the plaintiffs in the causes now before this Court. Accordingly, the District Court presumably was of the opinion that a person 18 or over, but under 21 years of age, could not legally renounce their citizenship under the pertinent statutes here under discussion. We submit that in so finding, the District Court was in error for the reasons hereinafter set forth.

Prior to the enactment of section 401 (i) of the Nationality Act of 1940, as amended, there was some conflict of opinion as to whether a person under the age of 21 could expatriate himself by any act of his own. The district court in *Baglivo v. Day*, 28 F. (2d) 44 (S. D. N. Y.) held not. To the same effect were dicta in *Ex parte Gilroy*, 257 Fed. 110, 119 (S. D. N. Y.), *McCampbell v. McCampbell*, 13 F. Supp. 847, 849 (W. D., Ky.), and *Ex parte Chin King*, 35 Fed. 354, 356 (D. Ore.).³⁶ *In re Wittus*, 47 F. (2d) 652 (E. D. Mich.), however, constituted a square holding that a woman under 21 years of age lost her citizenship through marriage to an alien under the repatriation statute then in effect. Cf. also *In re Carver*, 142 Fed. 623, 624 (C. C. Maine).

It was equally unsettled until the Supreme Court decision in 1939 in *Perkins v. Elg*, 307 U. S. 325, whether a minor born in the United States and hence a citizen thereof lost that citizenship if he was thereafter taken by his parents to a foreign country

³⁶ See also *Ludlam v. Ludlam*, 26 N. Y. 356, 376; *State ex rel Phelps v. Jackson*, 79 Vt. 504, 514.

wherein his parents obtained citizenship through naturalization. Both an administrative ruling (36 Op. Atty. Gen. 535) and a court decision (*United States v. Reid*, 73 F. (2d) 153 (C. C. A. 9)) had indicated prior to *Perkins v. Elg* that such a derivative naturalization was binding and exclusive. In *Perkins v. Elg*, however, those holdings were overruled, and in the course of that decision the Supreme Court utilized language which may be viewed as supporting the position taken by the district court in *Baglivo v. Day*, *supra*. It said (307 U. S. 325 at 324):

To cause a loss of (United States) citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.

During the year following this decision Congress enacted the present Nationality Act (54 Stat. 1137).³⁷ Section 401 thereof provided that: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by" the performance of any of eight different acts which were

³⁷ The groundwork for this legislation was laid by an interagency committee appointed by the President by Executive Order No. 6115 of April 25, 1933. Pursuant thereto the committee, composed of the Secretaries of State and Labor, and the Attorney General, submitted a proposed codification of the nationality laws of the United States which was transmitted to Congress by the President on June 12, 1938. This proposed code, as subsequently modified and amended by Congress, became the Nationality Act of 1940. See *Codification of the Nationality Laws*, *House Committee Print*, 76th Cong., 1st Sess.

set forth in separately lettered subdivisions (a-h, inclusive) thereto. Subsequently two further subdivisions, (i) and (j), were added by amendment. These provisions are collected in 8 U. S. C. 801 and, for convenience, are referred to hereinafter under their Code designations.

Section 403 (b) of the Nationality Act of 1940 (8 U. S. C. 803 (b)) provides as follows:

No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

Briefly described subsection (b) relates to the taking of a foreign oath of allegiance; subsection (c) to the performance of foreign military service; (d) to the holding of certain positions in the civil service of a foreign state; (e) to voting in a foreign election or plebiscite; (f) to making a formal renunciation of United States nationality while abroad; and (g) to deserting the military or naval service of the United States in time of war. Congress thus provided that the performance of any one of these six out of the eight original acts of expatriation set forth in the Nationality Act of 1940 would cause a loss of nationality provided the performer was not under 18 years of age at the time. No provision concerning age, however, was made by the enacting Congress with respect to obtaining naturalization in a foreign state upon the individual's own initiative (8 U. S. C. 801 (a)) or with respect to a conviction of treason (8 U. S. C. 801 (h)). There is a similar silence with respect to the subsequently enacted subsections (i) and (j).

Prior to a discussion of the legislative history and administrative interpretation of 801 (i) itself, it should be pointed out that the 18-year-old minimum with respect to acts of expatriation was made general throughout the Nationality Act of 1940. Not only did Section 803 (b) adopt this minimum with respect to Section 801 (b)–(g), inclusive, but various other sections of that Act dealing with the acquisition of United States citizenship also make it evident that the enacting Congress believed that 18 should be the age at which mature and therefore binding judgments could be made with respect to nationality matters. Thus it was provided in Section 314 of that Act that an individual may become a United States citizen through the naturalization of his parents only if such naturalization takes place while the child is under 18 year of age (8 U. S. C. 714). Cognate provisions relating to the naturalization of children at the instigation of their natural or adoptive parents, *provided they are under 18 years of age*, are to be found in sections 315 (8 U. S. C. 715) and 316 (8 U. S. C. 716) of the Nationality Act of 1940. And an applicant for naturalization on his own behalf may make a declaration of intention to become a citizen of the United States only “after the applicant has reached the age of eighteen years.” Section 331 of the Nationality Act of 1940 (8 U. S. C. 731).

The Congressional purpose that 18 should be the age of discretion in this field, thus clearly shown throughout the statute itself, was specifically stated prior to the enactment of Section 803 (b). This Section was proposed and its purpose was described by

the Cabinet Committee which drafted the Nationality Code,³⁸ as follows (*Codification of the Nationality Laws*, House Committee Print, 76th Cong., 1st Sess., p. 69):

The reasons for adopting this provision are obvious. It does not seem reasonable that an immature person should be able to expatriate himself by any act of his own. With regard to this point see *Ludlam v. Ludlam*, 84 Am. Dec. 193, 208; *State of Vermont ex rel Phelps v. Jackson*, 79 Vt. 504; *Ex parte Gilroy*, 257 Fed. 110, 121; *U. S. ex rel Baglivo v. Day*, 28 F. (2d) 44. It will be observed that in this subsection the age below which a person cannot expatriate himself is set at 18 years, instead of 21 years. *It is believed that a person who has reached the age of 18 years should be able to appreciate fully the seriousness of any act of expatriation on his part.* Moreover, in time of war young men are frequently accepted for military service before they have reached the age of 21 years, and, under the laws of some foreign countries males become liable for the performance of involuntary military service when they reach the age of 18 years. [Italics supplied.]

A condensed version of this statement is also found in the report of the Senate Committee on this same legislation (Sen. Rep. 2150, 76th Cong., 3d Sess., p. 4):

³⁸ See last preceding footnote, *supra*. As below described the section was adopted as proposed save for the substitution of the letter (g) for the letter (h). Section 801 which this section modifies was also adopted substantially as proposed by the administrative committee—the only changes being an addition to the text of subsection (a), the deletion of a proposed subsection (f), and the addition of a new subsection (h).

Expatriation for certain specified acts may occur after a citizen has reached the age of 18 years for the reason that in many foreign countries the duties of citizenship, including that of bearing arms, begins at the age of 18 years.

Referring again to the work of the Cabinet Committee, it is also important to note its comment with respect to what became subsection (f) of Section 801, which provides:

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State;

The explanatory comment of the Cabinet Committee was in part as follows (Codification of the Nationality Code, *supra*, p. 67, comment on subsection (g)):

This provision is designed specifically for the use of persons who shall have acquired at birth the nationality of a foreign state, as well as that of the United States, and who, *upon reaching majority*, elect the nationality of a foreign state * * * [Italics supplied.]

Since the 18-year minimum set forth in 803 (b), both as proposed by the Cabinet Committee and as finally enacted, was specifically made applicable to 8 U. S. C. 801 (f) set forth above, an intent to make 18 years the age of majority with respect to the Nationality Act of 1940 becomes again apparent.

It may be argued, since subsections (a) and (h) were not included in 803 (b), that the enacting Congress meant to establish a different age limit with respect to those subsections, and that the failure to

include the subsequently enacted subsections (i) and (j) within the purview of 803 (b) is indicative of a similar intent. Even if such a conclusion were to be reached, however, it by no means follows that the age limit applicable to those subsections is 21. No stated reason for the failure of the enacting Congress to include (a) and (h) has been found in the legislative history of the Nationality Act. We may, however, speculate.

Subsection (a) involves, as does no other subsection of 801, a matter of comity between nations. As stated by the Cabinet Committee (Codification of Nationality Laws, *supra*).

The Government of the United States took the position that such naturalization (of aliens) should be regarded as having terminated their original nationality and allegiance. It necessarily followed that this Government was obligated to recognize the naturalization of citizens of the United States in foreign countries as having the effect of terminating their American nationality and allegiance. This principle has been confirmed in various treaties concluded by the United States with foreign states. * * *

It is thus entirely possible that 801 (a) was deliberately omitted from the scope of 803 (b) in order to permit recognition of naturalizations occurring in countries permitting an acquisition of nationality therein under the age of 18, or to afford complete freedom in the negotiation of treaties with such countries.

There is moreover another, and perhaps equally plausible, explanation for the omission of subsection

(a) from the coverage of section 803 (b). Subsection (a) was proposed by the cabinet committee in the following form (Codification of the Nationality Code, *supra*):

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person;

It will be seen that this proposed subsection covered two situations—the obtaining of foreign naturalization by an individual on his own initiative, and the obtaining of naturalization derivatively through the naturalization of a parent. The accompanying explanatory comment of the cabinet committee, written, of course, prior to the decision in *Perkins v. Elg*,³⁹ makes plain its brief, buttressed by the prior ruling of the Attorney General and the decision in *United States v. Reid*, *supra*, that a derivative citizenship obtained through the naturalization of a parent was binding upon an infant, no matter at what age obtained. Thus it might have been deemed inappropriate by the cabinet committee to recommend the inclusion of subsection (a) within the proviso of 803 (b). Moreover, when the enacting Congress amplified 801 (a), apparently in view of *Perkins v. Elg*, to provide a right of election to be exercised before attaining the age of 23 years in cases of dual nationality obtaining derivatively, a similar desire not to create confusion by the inclusion of subsection (a) within the purview of 803 (b) might have obtained.

³⁹ The cabinet committee report was submitted in 1938; *Perkins v. Elg* was decided in 1939.

Whether or not these speculations as to the reason for this omission are correct—and it is recognized that certain difficulties exist with respect to the second hypothesis advanced—it is nearly impossible to ascribe to Congress an intent to establish a 21-year-age minimum with respect to subsection (a) when the general statutory scheme provided an 18-year minimum. The cabinet committee, which as above noted also excluded subsection 801 (a) from the draft of what became section 803 (b) quoted (at p. 67) with evident approval an opinion of a former Attorney General that: “Naturalization is without doubt the highest * * * evidence of expatriation.” 14 Op. Atty. Gen. 295, 297. It may be suggested that other acts of expatriation set forth in Section 801 could conceivably be performed without knowledge of the consequences. This could hardly be said, however, with respect to the necessarily formalistic act of obtaining a foreign naturalization. And it was the consensus of the framers of the legislation that: “It is believed that a person who has reached the age of 18 years should be able to appreciate fully the seriousness of *any* act of expatriation.” (See *supra*.) [Italics supplied.]

Upon the basis of the foregoing it would appear possible that the enacting Congress omitted making reference to 801 (a) in 803 (b) because it conceived that an occasion might arise for recognizing foreign naturalization obtained by persons under the age of 18, or simply because it desired to avoid possible confusion with respect to the dual nationality situation also covered therein, but it would seem incredible

that its silence in this respect indicated an intent to establish a 21-year minimum under which the obtaining of a foreign naturalization should be void.

Subsection (h) of Section 801 providing for a loss of nationality upon a conviction "by a court martial or by a court of competent jurisdiction" of "committing any act of treason or attempting by force to overthrow or bearing arms against the United States" was added to the proposed nationality code by Senate amendment.⁴⁰ Again it would appear that Congress may have had good reason for not setting a specific age minimum in such cases. It is familiar law that an infant who has reached an age of discretion may commit treason just as he may commit other crimes. See 52 *Am. Jur.* sec. 3, p. 796. It will be noted that subsection (h) requires that there be a prior conviction before a loss of nationality occurs. Thus opportunity for raising the defense of infancy in the trial court is accorded. The fact that such a defense would inevitably have to be considered by the trial court removed the necessity of a Congressional presumption of competency such as was made in 803 (b) with respect to the acts of expatriation set forth in subsections (b)-(g). We think it entirely inferable therefore that Congress proceeded on the assumption that anyone old enough to suffer the usual consequences of a treason conviction should be considered old enough to suffer the particular consequence of expatriation. Certainly

⁴⁰ Compare House Reports 2396 and 3019, both of the 76th Congress. The amendment was inserted by the Senate after the Act had passed the House.

there could be no reason for attributing to Congress an intent, entirely unspecified, to establish a higher age minimum for this most serious act than was made applicable to the actions specified in subsections (b) to (g) described *supra*, pp. 85-87.

Subsections (i) — the renunciation statute — and (j) were added to Section 801 by the 78th Congress. (Act of July 1, 1944, 58 Stat. 677; Act of September 27, 1944, 58 Stat. 746.) In neither subsection did that body specify any minimum age limit, nor did it amend 803 (b) in either case. Yet it would appear inconceivable that (j) was meant to apply only to persons 21 and over. That subsection provides:

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval force of the United States.

In the House debates concerning H. R. 4257, one part of which became subsection (j), the sponsor of the bill, Mr. Dickstein, stated, "Any man, any American who leaves the country for the purpose of not serving his country in time of war is a traitor, in my judgment." He was then asked by a colleague: "I understand by that *if they are within the qualifying age* and an emergency exists then it is determined that they have left the country for that purpose?" [Italics supplied.] Mr. Dickstein answered: "That is right." *90 Cong. Rec. 3261*. Again, prior to final passage of the bill, Mr. Dickstein stated that, "The

purpose of the bill is to keep out of the country certain people who evaded war service and left this country after Pearl Harbor. * * * This bill will keep them out, and they will not be given a change [sic] to come back. *They are of military age.*" 90 *Cong. Rec.* 7725-7726. It hardly requires further demonstration that subsection (j) was intended to reach persons subject to military service at the time, nor that persons 18 years of age were subject to induction into such service prior to and after the outbreak of the last war. *Sec. 3, Selective Training and Service Act of 1940 (54 Stat. 885).*

The omission of a specified age limit in subsection (j), which as shown was made applicable to persons under 21,⁴¹ by the same Congress which enacted subsection (i), in itself, we submit, raises a strong presumption that that body was not thinking in terms of a possible impact which the common law might have upon the additions it was making to the nationality laws. It follows that the Congressional failure to amend Section 803 (b) when enacting Section 801 (i) is thus immaterial, and we may accordingly look elsewhere to determine the true intent of Congress.

It is important to state that it is not necessary to determine whether Congress meant in passing 801 (i) to leave the question of age at large, as we believe it did with respect to subsection (h) particularly, or

⁴¹ A subsequent administrative construction of subsection (j) has also held that an individual under 21 is subject to the provisions thereof. This conclusion was reached by the Attorney General on May 18, 1946, in the case of *In re Ismael Acosta Hernandez*, exclusion proceedings No. 56196/251.

whether it assumed that the general statutory scheme of establishing 18 as the age of majority would apply. This is because in the administration of that subsection the Attorney General adopted a rule that renunciations could only be executed by persons 18 and over. In so doing he was fully aware of the legislative background of subsection (i), for the Attorney General himself proposed its enactment to the Congress and appeared at Congressional hearings to give testimony concerning it. See Hearings, House Committee on Immigration and Naturalization (78th Cong., 2d Sess.) on H. R. 4103. Examination of these Hearings and of the debates demonstrates that although the bill was of universal applicability, a purpose of the bill was to reach persons of Japanese ancestry 18 years of age and over who had answered Question 28 in the negative (Hearings, pp. 37, 52, 54-55; 90 Cong. Rec. 1778-1779, 1786-1789, 1982-1984).⁴² In the light of this fact, and in the light of the Attorney General's construction of 801 (i) permitting renunciations by persons 18 years of age (Cf. *United States v. American Trucking Ass'ns.*, 310 U. S. 534;⁴³ *Shapiro v. United States*, 335 U. S. 1, note 13, and cases there cited), we submit that this Court should reverse the holding of the court below that a formal renunciation of United States nationality is void unless

⁴² It may be noted that the registration of persons 17 and over occurred in 1942, and that consequently such persons were at least 18 by July 1, 1944, when the renunciation statute was enacted.

⁴³ As there stated: "*Furthermore the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provision's enactment to Congress.*" 310 U. S. 534 at 549. [Italics supplied.]

the renunciant was at the time 21 years of age or over. A contrary ruling, we submit, would not only fly in the teeth of the manifest Congressional intent but would create a further incongruity in that formal renunciations of United States nationality, if made outside this country, would be binding at the age of 18 (8 U. S. C. 801 (f)) whereas formal renunciations occurring in this country would not.

CONCLUSION

For the reasons stated in the specification of errors, the findings of fact entered herein by the District Court are erroneous in substance and form. For all the foregoing reasons, the judgment should be reversed.

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APPENDIX A

[Title of District Court and cause.]

DESIGNATION OF PLAINTIFFS IN COMPLIANCE WITH THE COURT'S ORDER ENTERED HEREIN ON SEPTEMBER 27, 1948

Come now the defendants, by their undersigned attorneys, in compliance with the Court's order entered herein on September 27, 1948, and without waiving their objection to the jurisdiction of the Court over the parties and subject matter of this action or to the Court's said order or the opinion and ruling upon which the same was based, and respectfully submit by Exhibits I through XX appended hereto as parts hereof, their designation of plaintiffs as to whom it is desired to present additional evidence at special individual hearings. The evidence which the defendants will introduce against each such designated plaintiff proves or tends to prove that each such designated plaintiff renounced United States nationality and citizenship of his or her own free will, choice, desire and agency, and shows that such renunciation was not caused by duress, menace, coercion and intimidation, fraud and undue influence.

The defendants respectfully suggest that in scheduling cases for trial, it should be remembered that a final judicial determination of the case of one plaintiff listed in a particular exhibit attached hereto, may prove dispositive of the cases of all or most other plaintiffs listed in the same exhibit; therefore it is probable that much time and effort will be saved by postponing the trial of all but one or two cases listed

in a particular exhibit until after final judicial action has been taken in the cases selected for trial.

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 FRANK J. HENNESSY,
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 ENOCH E. ELLISON,
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Attorney General,
 PAUL J. GRUMBLY,
Attorney, Department of Justice,
Attorneys for Defendants.

GENERAL OFFER OF PROOF

The defendants will introduce documentary evidence as to each of the plaintiffs designated in the following Exhibits I through XX, inclusive, which will show among other things, that each of the designated plaintiffs accomplished their renunciation of citizenship under the following procedure: (a) A request in writing by such plaintiffs to the Attorney General at Washington, D. C., for a form entitled "Application for Renunciation of United States Nationality"; (b) Upon the receipt of such "Application for Renunciation of United States Nationality", the execution thereof and the dispatch of the same to the Attorney General; (c) A subsequent hearing afforded to each individual foregoing plaintiff, conducted by a Caucasian hearing officer designated by the Attorney General, at which hearing no person of Japanese descent other than the afore-mentioned individual plaintiff was present; (d) Subsequent to a hearing, the filing with the hearing officer of a form prescribed by the Attorney General of a formal written renunci-

ation of nationality and a request by such plaintiffs for the Attorney General's approval of such renunciation as not contrary to the interests of national defense; (e) The submission to the Attorney General for his approval or disapproval of the hearing officer's recommendation and the record of the hearing and any other facts upon which such recommendation was based; (f) The issuance of an order by the Attorney General approving the afore-mentioned plaintiffs' renunciation of United States Nationality as not contrary to the interests of national defense and the notification to such plaintiffs of the Attorney General's approval of their formal written renunciation of United States Nationality. All such evidence tends to prove that the renunciations of citizenship by the plaintiffs herein were of their own free will and accord and were desired by them.

By the introduction of such evidence, except as to plaintiffs listed in Exhibit VII through XI, inclusive, the defendants do not waive their contention that none of the plaintiffs has established that he is being denied a claimed right of citizenship such as would give him a cause of action under the Nationality Act of 1940 (8 U. S. C. § 903) or that there exists between him and any defendant a case or controversy giving the Court jurisdiction under Article III of the Constitution of the United States.

I

<i>Name</i>	<i>Birth date</i>
ABE, Ezumi-----	2/21/23

[Omitted are the names of 93 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce additional docu-

IV

mentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan.

II

<i>Name</i>	<i>Birth date</i>
AOKI, Masayoshi-----	2/18/19

[Omitted are the names of 75 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons were leaders of pro-Japanese organizations at Tula Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan.

III

<i>Name</i>	<i>Birth date</i>
ABE, Haruko-----	5/29/27

[The names of 330 additional plaintiffs listed in the original designation are omitted here. This list was corrected by Defendants' Supplemental Return to Court's Order to Show Cause (Appendix, p. XII, *infra*) by transferring four names to another group. The correct number of plaintiffs in this group, accordingly is 327.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were members of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan.

IV

<i>Name</i>	<i>Birth date</i>
ADACHI, Emilko-----	2/10/25

[The names of 383 additional plaintiffs listed in the original designation are omitted here. This list was corrected by Defendant's Supplemental Return to Court's Order to Show Cause (Appendix, p. XII, *infra*) by transferring two names to another group. The correct number of plaintiffs in this group, accordingly is 382.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were members of pro-Japanese organization at Tule Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan.

V

<i>Name</i>	<i>Birth date</i>
ADACHI, Yukiko-----	6/4/21

[Omitted are the names of 280 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan and subsequent to their renunciations at Tule Lake, voluntarily returned to Japan.

VI

<i>Name</i>	<i>Birth date</i>
ADACHI, Kiyoshi-----	9/13/26

[The names of 287 additional plaintiffs listed in the original designation are omitted here. This list was corrected by Defendants' Supplemental Return to Court's Order to Show Cause (Appendix, p. XII, *infra*) by transferring four names to other groups. The correct number of plaintiffs in this group, accordingly is 284.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence

VI

which will show that such persons, subsequent to their renunciations at Tule Lake, voluntarily returned to Japan.

VII

<i>Name</i>	<i>Birth date</i>
HAMAMOTO, Matsuichi-----	4/15/06

[Omitted are the names of 5 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are presently under Alien Enemy Removal Orders of the Attorney General.

VIII

<i>Name</i>	<i>Birth date</i>
AOKI, Shinichi-----	10/12/20

[Omitted are the names of 216 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their education and formal schooling in Japan, applied for expatriation at Tule Lake prior to their renunciations of citizenship, and are under Alien Enemy Removal Orders of the Attorney General.

IX

<i>Name</i>	<i>Birth date</i>
AMEMIYA, Yoshio-----	1/10/21

[Omitted are the names of 6 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are under Alien Enemy Removal Orders of the Attorney General.

X

<i>Name</i>	<i>Birth date</i>
NAKAYAMA, Toshiro-----	7/17/20

With respect to the foregoing plaintiff, the defendants will introduce documentary evidence which will show that such person received his education and formal schooling in Japan, was a leader of a pro-Japanese organization at Tule Lake, and is presently under Alien Enemy Removal Order of the Attorney General.

XI

<i>Name</i>	<i>Birth date</i>
AMEMIYA, Gore-----	11/11/23

[Omitted are the names of 68 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons are under Alien Enemy Removal Orders of the Attorney General and have otherwise demonstrated that their renunciation of citizenship was voluntary.

XII

<i>Name</i>	<i>Birth date</i>
GOTO, Ginji-----	5/25/22

[Omitted are the names of 20 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will

VIII

show that such persons received their schooling and formal education in Japan, were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General.

XIII

<i>Name</i>	<i>Birth date</i>
ABE, Isoyo-----	7/31/17

[Omitted are the names of 1,065 additional plaintiffs designated in the original designation filed in the District Court. Four of such plaintiffs were designated in defendants' supplemental return to Order to Show Cause (Appendix, p. XII, *infra*.)]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan, and applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General.

XIV

<i>Name</i>	<i>Birth date</i>
IMAHARA, Masao Henry-----	10/28/12

[Omitted are the names of 12 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General.

XV

<i>Name</i>	<i>Birth date</i>
ABE, Takashi-----	5/11/18

[Omitted are the names of 1,075 additional plaintiffs designated in the original designation filed in the District Court. Five of such plaintiffs were designated in defendants' supplemental return to Order to Show Cause (Appendix, p. XII, *infra*.)]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence that such persons applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General.

XVI

<i>Name</i>	<i>Birth date</i>
FUKUMOTO, Katsumi-----	12/10/18

[Omitted are the names of 6 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan and applied for expatriation subsequent to their renunciation of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General.

XVII

<i>Name</i>	<i>Birth date</i>
NISHIMURA, Toru-----	6/21/20

[Omitted are the names of 7 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation subsequent to their renunciation of

citizenship at Tule Lake, but are not under Removal Orders of the Attorney General.

XVIII

<i>Name</i>	<i>Birth date</i>
IMOTO, Geo.....	6/17/24

[Omitted are the names of 10 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons applied for expatriation subsequent to their renunciation of citizenship at Tule Lake.

XIX

<i>Name</i>	<i>Birth date</i>
ADACHI, Kazuo	3/11/21

[Omitted are the names of 277 additional plaintiffs designated in the original designation filed in the District Court. One of such plaintiffs was designated in defendants' supplemental return to order to show cause (Appendix, p. XII, *infra*.)]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons, although they did not receive their education in Japan, were not leaders of a pro-Japanese organization at Tule Lake, did not apply for expatriation prior or subsequent to their renunciation of citizenship and are not under Removal Orders of the Attorney General, nevertheless, otherwise demonstrated that their renunciation of citizenship was voluntary.

XX

<i>Name</i>	<i>Birth date</i>
DOI, Hajime.....	12/19/02

[Omitted are the names of 82 additional plaintiffs designated in the original designation filed in the District Court.]

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons did not renounce their citizenship at the Tule Lake Segregation Center, and were not therefore subjected to the factors which this Court held, in its interlocutory decree, to be of such a nature that they cast the taint of incompetency upon the acts of renunciation of citizenship.

XXI

<i>Name</i>	<i>Birth date</i>
DOI, Hideko_____	10/30/18
KATACKA, Yukio_____	4/9/18
NAKAMURA, Miyoko_____	4/22/19
OGATA, Miyako (Louise)_____	11/7/16
SAKURAI, Teruo Richard_____	11/16/26
SUNADA, Masaru (Steve)_____	7/9/15
TOMITA, Hirowo (Art)_____	8/30/21

With respect to the plaintiffs listed in this exhibit the defendants suggest that such persons should be dismissed from this suit for the reason that their purported acts of renunciation were never approved by the Attorney General as required by Sec. 801 (i), Title 8 U. S. C.

XXII

<i>Name</i>	<i>Birth date</i>
FUDETANI, Shigeno_____	10/19/17
HASHIGUCHI, Nagatoshi_____	5/13/25
SHIMADA, Takeo Frank_____	12/19/15
SHINDE, Yoshiko (Helen)_____	1/3/16
SHOJI, Flora Helen_____	10/20/24
SUMI, Torao_____	5/6/20
TODA, Yoshikazu_____	3/14/20
UYEHARA, Yutaka Tom_____	10/24/17

If it should be finally determined that the Court has jurisdiction in these actions then, and in that event only, the defendants do not offer any objection to the entry of a final decree in favor of the plaintiffs listed in this exhibit for the reason that at the time of their respective renunciation of citizenship or

immediately subsequent thereto, reports of competent medical doctors indicated that such persons did not have sufficient mental capacity to accomplish a legally binding act.

APPENDIX B

[Title of District Court and cause.]

DEFENDANT'S RETURN TO COURT'S ORDER TO SHOW CAUSE WHY PREVIOUSLY FILED DESIGNATION OF PLAINTIFFS SHOULD NOT BE STRICKEN

Come now the defendants in answer to the Court's Order to Show Cause why the designation of plaintiffs as to whom the defendants wish to present further evidence at individual hearings should not be stricken and a judgment entered in favor of the plaintiffs thereon and respectfully say as follows:

1. Each such designation is accompanied by an offer of proof sufficient to meet the burden of going forward with evidence in accordance with the opinion of this court entered herein on April 29, 1948 (77 F. Supp. 806) and the court's interlocutory decree entered thereon on September 27, 1948, and further say that such designation does not constitute redundant, immaterial, impertinent or scandalous matter. The defendants further assert that questions relating to the relevancy and sufficiency of the documentary evidence mentioned in their general offer of proof, as set forth in the aforesaid designation are involved in the consolidated cases of *Clark et al v. Inouye et al.* and *Marshall v. Murakami et al.* now pending for decision before the United States Court of Appeals for the Ninth Circuit as Nos. 11839 and 12082.

2. All the designated plaintiffs in Exhibits I through XIX, inclusive, were segregated at the Tule Lake Center at the time of their renunciations pursuant to

the following pertinent provisions of Chapter 110 of the War Relocation Administration Manual, Section 110.3.

1. All persons in the following categories shall remain in the Tule Lake Center, or shall be transferred to that center, as the case may be:

A. All persons who have formally asked for repatriation or expatriation to Japan and have not retracted their requests prior to July 1, 1943. If a Project Director should believe that residence in the Tule Lake Center by a particular person in this category would work an unnecessary hardship, he may recommend to the Director that such person be excepted from the category; and if the Director approves, such person shall be excepted.

B. All persons who, at the time of the registration for Army service and war industries purposes, answered question 28 of Form WRA-126 Rev. or DSS Form 304A in the negative, or failed or refused to answer it, and (a) who have not changed their answers prior to the date of this instruction, and (b) who are in the opinion of the Project Director loyal to Japan, or are not loyal to the United States. For the purpose of segregation, no person in this category shall be considered loyal to the United States unless he expressly changes his answer to question 28 to an affirmative and satisfies the Project Director that the changed answer is bona fide.

C. All persons to whom the Director has denied leave clearance. This category will include persons in the following classes after hearings have been held and if and when leave clearance has been denied under Chapter 60: (a) Persons about whom there is an adverse report by a Federal intelligence agency; (b) persons who have answered question 28 negatively and who changed their answers prior to

the date of this instruction, or who answered such question with a qualification; (c) persons who have requested repatriation or expatriation and have retracted their request prior to July 1, 1943, and persons who have requested repatriation or expatriation subsequent to July 1, 1943; (d) persons for whom the Japanese-American Joint Board established in the Provost Marshal General's office does not affirmatively recommend leave clearance; and (e) persons about whom there is other information indicating loyalty to Japan.

10/6/43

Supersedes A. I. #100

2. Members of the immediate family of a person who falls within one of the three categories set forth in Section 110.3.1 shall upon their individual request be permitted to remain with such person in the Tule Lake Center, or to accompany him to that center, as the case may be. If minor members of the immediate family who do not themselves fall within one of the categories set forth in Section 110.3.1 object to residence at the Tule Lake Center every possible assistance shall be extended in helping to work out appropriate arrangements along the lines suggested in Section VI-D of Administrative Instruction No. 65 (Manual Section 70.1), dealing with minor children of persons being repatriated. For the purpose of determining what is an immediate family the guides set forth in Section XII of Administrative Instruction No. 103 (Manual Section 30.4) shall be followed.

Question 28 of Form WRA-126 Rev. or DSS Form 304-A, referred to in the above-mentioned paragraph 1B of said WRA Manual was in the following form for answer by male citizens of Japanese ancestry 17 years of age and over.

Question 28: Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and/or all attack by foreign or domestic forces and forswear any form of allegiance or obedience to the Japanese Emperor, or any other foreign government, power, or organization?

The form of question 28 for female citizens is as follows:

Question 28: Will you swear unqualified allegiance to the United States of America and forswear any form of allegiance or obedience to the Japanese Emperor or any other government, power, or organization?

3. With respect to those persons named in Exhibits XI through XIX of the designation filed by defendants, as aforesaid, the defendants in response to the said Order to Show Cause now offer to prove in addition that all of the designated plaintiffs in the said Exhibits XI through XIX, inclusive, with the exception of the following-named persons were at the Tule Lake Segregation Center as the result of answering the above quoted question 28 in the negative or as the result of refusing to answer the same.

Designated in exhibit XI

<i>Name</i>	<i>Birth date</i>
CHUMAN, Toshiko N.....	8/27/18

[Omitted are the names of 21 plaintiffs designated in the Defendants' Return to Court's Order to Show Cause filed in the District Court.]

Designated exhibit XVI

<i>Name</i>	<i>Birth date</i>
FUKUMOTO, Katsumi.....	12/10/18

Designated in exhibit XVII

<i>Name</i>	<i>Birth date</i>
FUKUDA, Mitsuye.....	4/27/26
INOUE, Miyeko.....	11/21/19
YOSHIMIYA, Masanobu.....	7/27/20

Designated in exhibit XVIII

<i>Name</i>	<i>Birth date</i>
MARIMATSU, Shikuko-----	12/6/16
YOSHIMIYA, Mitsuye Peggy-----	11/6/24
YOSHIMIYA, Shizuye-----	11/8/22

Designated in exhibit XIX

<i>Name</i>	<i>Birth date</i>
AREDAS, Daniel-----	4/1/24

[Omitted are the names of 95 plaintiffs designated in the Defendants' Return to Court's Order to Show Cause filed in the District Court.]

The defendants do not yet have sufficient information to prove with specificity the reasons why plaintiffs listed above were segregated at Tule Lake, and in this regard, for present purposes, rely upon the presumption of administrative regularity in executing the above-quoted regulations.

4. The defendants in further answer to the Court's Order to Show Cause, again respectfully direct the Court's attention to the fact that none of the named plaintiffs in Exhibit XX renounced at the Tule Lake Segregation Center and, consequently, the factors which the Court found in its Interlocutory Decree to have existed at Tule Lake and to have cast the taint of incompetency upon any act of renunciation of citizenship clearly were not operative as to such persons.

5. In opposition to the affidavit of Wayne M. Collins filed in support of the plaintiffs' motion to strike designations, there are appended hereto as parts hereof the affidavits of Thomas M. Cooley, II and Paul J. Grumbly.

WHEREFORE, the defendants respectfully submit that the Order to SHOW CAUSE should be dis-

charged and that the plaintiffs' motion to strike the defendants' said designation should be denied.

H. G. MORISON,
Assistant Attorney General,

FRANK J. HENNESSY,
United States Attorney,

ENOCH E. ELLISON,
Special Assistant to the Attorney General,

PAUL J. GRUMBLY,
Attorney, Department of Justice.

Attorneys for Defendants.

In the United States District Court for the Northern

District of California, Southern Division

No. 25294-G (Consolidated No. 25294-G)

TADAYASU ABO ET AL., ETC., PLAINTIFFS

v.

TOM CLARK, ETC., ET AL., DEFENDANTS.

AFFIDAVIT OF THOMAS M. COOLEY, II

CITY OF WASHINGTON,

District of Columbia, ss:

THOMAS M. COOLEY, II, at the specific request of the Department of Justice, being first duly sworn, deposes and says:

On April 8, 1947, I resigned my position with the Department of Justice and thereby terminated my official connection with the Alien Enemy Control Unit and the Office of the Attorney General. Since such date I have been unauthorized to act and have not acted as an attorney for the defendants in the above-entitled action.

At the time that I resigned my position with the Department of Justice, to the best of my recollection and belief, the above action was pending on cross

motions for summary judgment. I do recall that when such cross motions were filed it was my opinion that the submission of the case on cross motions had the effect of foreclosing the introduction of further evidence and it is possible that I may have expressed that opinion to counsel for the plaintiffs. However, to the best of my recollection and belief, I never at any time indicated in any way to counsel for the plaintiffs or anyone else that the Government would not, under any circumstances, introduce further evidence in the above-entitled case.

THOMAS M. COOLEY, II.

Subscribed and sworn to before me this 4th day of March, 1949.

MARY R. MCLEAN,
Notary Public.

[SEAL]

My commission expires October 14, 1951.

In the United States District Court for the Northern
District of California Southern Division

No. 25294-G (Consolidated No. 25294-G)

TADAYASU ABO, ET AL., ETC., PLAINTIFFS, *v.* TOM CLARK,
ETC., ET AL., DEFENDANTS.

AFFIDAVIT OF PAUL J. GRUMBLY IN ANSWER TO AFFIDAVIT
OF WAYNE M. COLLINS MADE IN SUPPORT OF MOTION TO
STRIKE DESIGNATION AND FOR ORDER TO SHOW CAUSE

CITY OF WASHINGTON,
District of Columbia, ss:

PAUL J. GRUMBLY being first duly sworn deposes
and says:

That he is an attorney of record for the defendants
herein.

That in answer to the allegations contained in Paragraph 6 of the Motion to Strike Designation, to the effect that the Designation violates the oral representations made to this Court and to counsel for the plaintiffs, by Paul J. Grumbly, such alleged oral representations being set forth more fully in the first grammatical paragraph of page 5 of the said affidavit of Wayne M. Collins, the affiant denies that he made representations to the Court or to counsel for the plaintiffs, that such designations, if any, would be few in number but that rather he represented to the Court that the survey of pertinent government records, then in progress, for the purpose of ascertaining what plaintiffs should be designated, in accordance with the opinion, decree and order of this Court allowing such designation, was not completed and that until the same was accomplished it would be impossible to determine accurately the character of the final designation of plaintiffs.

That in view of the noncompletion of the aforementioned survey, the affiant requested the Court for an extension of time for the completion of the same and the filing of a designation on or before February 25, 1949, and that at the hearing on January 25, 1949, no representation was made by the affiant with respect to the exact number of plaintiffs which would be finally designated.

That it is the affiant's best recollection that he represented to the Court that the matter of final designation was not a matter upon which affiant could speak with finality and that in response to such observation the Court indicated that while, of course, the judgment of the officials of the Department of Justice would be the guiding light in making such final determination of designees, at the same time it emphasized that the designation should be made by the Government in the utmost good faith with

the particular view that the interests of justice would be served by such designation.

That in corroboration of the afore-mentioned statement there is attached hereto and made a part hereof a copy of a letter sent by the affiant to the Attorney General on January 26, 1949, setting forth the results of the afore-mentioned hearing.

That the affiant informed the Attorney General as is shown in the attached letter of the affiant that the Court was interested in a designation of the names of such plaintiffs as the Department of Justice felt were not entitled to the benefits of the Court's equity decree restoring the citizenship of the said plaintiffs.

There is also attached hereto a copy of a letter from the Department of Justice to the United States Attorney indicating the reasons for the form of the designation.

That the affiant denies that the Court signed the order extending the defendants' time to file the said designation of plaintiffs to and including February 25, 1949, on the basis of the oral representations of the affiant that said designations would be few, if any, in number for the reason that no such representation was ever made by the affiant and to the best of the affiant's recollection the order of the Court extending the time was predicated upon representations of the affiant that the survey afore-mentioned was not completed and on the further ground that such extension of time was reasonable in view of the large number of additional plaintiffs added to the suit by plaintiffs' attorney subsequent to the issuance of the Court's opinion of April 29, 1948.

PAUL J. GRUMBLY.

Subscribed and sworn to before me this ----- day of March 1949.

SARA E. KIDWELL.

My commission expires September 14, 1951.

JANUARY 26, 1949.

Air Mail Special Delivery

Re: Tule Lake Equity Cases Nos. 25294-G, 25295-G,
consolidated number 25294-G; Your ref. 93-1-1320.

THE ATTORNEY GENERAL,

Washington, D. C.

(Attention: Mr. E. E. Ellison, Claims Division.)

DEAR SIR: At a conference on January 25 in the chambers of Judge Goodman of the Northern District of California, attended by Messrs. McMillan, Collins, and Grumbly, an extension of time to designate plaintiffs, in which the Government wishes to present further evidence, was obtained to February 25, 1949. You have herewith a certified copy of the order dated and filed January 25, 1949.

The request for extension of time was vigorously opposed by Mr. Collins, attorney for the plaintiffs, and it was only after serious consideration of defendants' motion for an extension of time, that same was granted.

The Court indicated that it was not interested, for the purposes of designation, in any classification of plaintiffs to be designated but merely is interested in a simple designation of names of such plaintiffs as the Department of Justice feels should be designated and who they feel are not entitled to the benefits of the equity decree restoring their citizenship.

Judge Goodman emphasized that the designation should be made by the Government in the utmost good faith, with the particular view that the interests of justice would be served by such designation.

While Judge Goodman indicated that of course the judgment of the officials of the Department of Justice would be the guiding light in a determination of what the interests of justice would be in making such designation, he particularly emphasized the fact that the

calendar of the District Court for the Northern District of California was burdened with an overwhelming number of cases and that consequently the exercise of the highest judgment should be utilized in making such a designation so as not to further burden an already overburdened calendar.

It is suggested that in completing the remainder of the survey and in the possible reevaluation of facts already known concerning the plaintiffs in the above-entitled cases, that the admonitions and expressions of Judge Goodman be given due weight.

Respectfully,

P. J. GRUMBLY,
Attorney, Department of Justice.

[s] By R. A. McMILLAN,
Asst. U. S. Attorney.

Encl.

HGM: PJG

93-1-1320

FEBRUARY 23, 1949.

Air Mail Special Delivery

Re: *Mary Kaname Furuya et al. v. Tom C. Clark, etc., et al.; Tadayasu Abo et al. v. Tom Clark, etc., et al.*

FRANK J. HENNESSY, *Esquire*,
United States Attorney,
San Francisco 1, California.

DEAR MR. HENNESSY: Enclosed are designations of plaintiffs in the above cases as to whom it is desired to introduce additional evidence in compliance with the interlocutory order, judgment, and decree of the Court entered herein on September 27, 1948. It is requested that such designations be filed with the Court on or before February 25, 1949, the filing date set by the Court's Order of January 25, 1949.

In making such designations we have given careful consideration to Judge Goodman's view that they should be made by the Government in the interests of justice. If this means that we should be convinced by the available evidence that the renunciations were voluntary, in the sense that they were not results of fears of physical violence but were actually desired at the time they were made, you may assure him that we are so convinced. You may further assure him that, in our view, at least as strong a case can be made for sustaining the validity of the renunciations here as were made in the cases now on appeal from the decisions of the District Court for the Southern District of California. In view of that fact and in view of Judge Goodman's opinion in the instant cases, the Attorney General feels that he cannot properly concede that the renunciations of any of the designated plaintiffs were involuntary as a matter of fact or law. He, of course, reserves the right to take a different position in the event that the decisions now on appeal should be sustained.

In view of the pending of such appeals and the possibility that they may prove dispositive of many of the instant cases it seems desirable, as a practical matter, to avoid trials as to plaintiffs designated in Exhibit XIX until after final action on the appeals. Indeed, it is within the realm of possibility that the final decisions in the cases on appeal will render any further proceedings unnecessary.

If and when the Court sets individual hearings, it is requested that this office be notified by telegram of the names of the plaintiffs, so that the necessary photostating and certification may be accomplished with dispatch. In any event it is requested that you notify

this office by telegram of the Court's action with respect to the filing of this designation.

Sincerely yours,

H. G. MORISON,
Assistant Attorney General
 (For the Attorney General).

Encl. 294954.

APPENDIX C

[Title of District Court and Cause.]

DEFENDANTS' SUPPLEMENTAL RETURN TO COURT'S ORDER TO SHOW CAUSE WHY PREVIOUSLY FILED DESIGNATION OF PLAINTIFFS SHOULD NOT BE STRICKEN

Come now the defendants in further answer to the Court's Order to Show Cause why the designation of plaintiffs as to whom the defendants wish to present further evidence at individual hearings should not be stricken and a judgment entered in favor of the plaintiffs thereon and respectfully say as follows:

1. On February 28, 1949, this Court ordered and directed that the defendants in this cause, through their attorneys, appear before this Court on March 7, 1949, to show cause why the designation of plaintiffs filed herein by the defendants on February 25, 1949, should not be stricken from the record herein.

2. That the afore-mentioned time for appearance before this Court, as above stated, was extended to March 21, 1949.

3. The defendants in their original return to the Court's Order to Show Cause offered to prove, among other things, that all of the plaintiffs in Exhibits XI through XIX, inclusive, with the exception of persons named in said return, were at the Tule Lake segregation center as the result of answering question

28 of Form WRA-126 Rev. or DSS Form 304-A in the negative, or as the result of failing or refusing to answer the said question 28.

4. The defendants, in their afore-mentioned return, with respect to the persons named therein further alleged that they, at the time of the filing of the said return, did not have sufficient information to prove with specificity the reasons why such persons were segregated at Tule Lake and for their present purposes relied upon the presumption of administrative regularity in executing WRA regulations set forth in said return.

5. As a result of the above-mentioned postponement of the appearance of the defendants' attorneys before this Court, the said defendants are now able, in most cases, to prove with specificity and now offer to prove the reasons why such plaintiffs, listed in the Defendants' Return to the Court's Order to Show Cause, were segregated at Tule Lake. These reasons are as follows:

Designated in exhibit XI

<i>Name</i>	<i>Date of birth</i>
TAGAWA, Hiroshi.....	4/14/17
FURUTANI, Jiichi.....	10/15/25
FURUTANI, Takeichi.....	9/6/23

The above-named persons formally asked for repatriation to Japan and did not retract their request prior to July 1, 1943.

<i>Name</i>	<i>Date of birth</i>
KOYANAGI, Fukuo.....	5/21/24
KOYANAGI, Kayomi.....	9/5/21
NAKAMOTO, Tokuji.....	12/18/16
SAITO, Toshio.....	3/9/20
SESOKO, Masaichi.....	12/15/18
TAMASHIRO, Shigeru	5/22/14
UEZU, Anso.....	12/1/13

The above-named persons were transferred to Tule Lake from Hawaii Internment Camps and requested while in Hawaii, to be repatriated to Japan.

<i>Name</i>	<i>Date of birth</i>
KAWANA, Richard Takao-----	5/14/19

The above-named person was denied leave clearance by the Project Director at Tule Lake and requested repatriation subsequent to July 1, 1943.

<i>Name</i>	<i>Date of birth</i>
HIRAKI, Shigeru-----	1/13/22
ITAGAKI, Kikuno-----	5/29/19

The above-named persons were denied leave clearance and answered question 28 with a qualification.

<i>Name</i>	<i>Date of birth</i>
MIRIKITANI, Tsutomu-----	6/15/20
SHIMAKAWA, Tadayoshi-----	8/16/20
TAIRA, Shigeko-----	10/21/19
TSUHA, Kiyoko-----	6/6/21

The above-named persons either answered question 28 of Form WRA 126 Rev. or DSS Form 304-A in the negative or failed or refused to answer.

<i>Name</i>	<i>Date of birth</i>
OTA, Yoshio-----	9/17/22

The above-named person was denied leave clearance because of his statements to the Appeal Board for Leave Clearance which indicated loyalty to Japan.

<i>Name</i>	<i>Date of birth</i>
UYEDA, Isamu Sam-----	9/29/25

The above-named person was not affirmatively recommended leave clearance by the Japanese-American Joint Board of the Provost Marshal General's Office.

<i>Name</i>	<i>Date of birth</i>
CHUMAN, Toshiko N-----	8/27/18
FUJII, George-----	12/14/21
KUROYE (ASANO), Sadako-----	8/12/22

The above-named persons answered the aforementioned question 28 in the affirmative, were eligible to leave Tule Lake and therefore presumably remained there of their own volition. At the time of their mitigation hearings in January and February 1946, each of them freely admitted loyalty to Japan.

Designated in exhibit XVI

<i>Name</i>	<i>Date of birth</i>
FUKUMOTO, Katsumi Jimmy-----	12/10/18

The above-named person answered the afore-mentioned question 28 in the negative, changed his answer to the affirmative on April 17, 1943, and subsequently on October 25, 1943, changed his answer to the negative.

Designated in exhibit XVII

<i>Name</i>	<i>Date of birth</i>
YOSHIMIYA, Masanobu Jim-----	7/27/20

The above-named person failed to answer the said question 28.

<i>Name</i>	<i>Date of birth</i>
FUKUDA, Mitsuye (Mitsugi)-----	4/27/26

The above-mentioned person was not 17 years of age or older during the registration of citizens at relocation camps (February 1943 through March 10, 1943) and, as yet, lacking further information concerning the reason for his presence at Tule Lake, the defendants, for present purposes, rely upon the presumption of administrative regularity in executing the WRA Regulations set forth on pages 2 and 3 of their original return and say that said plaintiff was at Tule Lake voluntarily.

<i>Name</i>	<i>Date of birth</i>
INOUE, Miyeko-----	11/21/19

With respect to the above-mentioned person the defendants do not, as yet, have knowledge of the reason why such person was at Tule Lake and therefore, for present purposes, continue to rely upon the presumption of administrative regularity in executing the above-mentioned WRA Regulations.

Designated in exhibit XVIII

<i>Name</i>	<i>Birth date</i>
NARIMATSU, Shikuko-----	12/6/16

The above-mentioned person answered question 28 in the affirmative, had been approved for leave clear-

ance and consequently was at Tule Lake as a result of her own volition. Her stated reason for renunciation was that she wished to accompany her husband to Japan and thought it better to renounce for that purpose.

<i>Name</i>	<i>Birth date</i>
YOSHIMIYA, Mitsuye Peggy-----	11/6/24
YOSHIMIYA, Shizuye-----	11/8/22

With respect to the above-mentioned persons the defendants do not have knowledge of the reason why such persons were at Tule Lake and consequently for present purposes, continue to rely upon the presumption of administrative regularity in executing the WRA Regulations quoted in their return.

Designated in exhibit XIX

<i>Name</i>	<i>Birth date</i>
FUKUGAWA, Hiroko (Yagi)-----	4/22/19

[Omitted are the names of 16 plaintiffs designated in the Defendants' Supplemental Return to Court's Order to Show Cause filed in the District Court.]

The above-named persons answered question 28 of Form WRA 126 Rev. or DSS Form 304-A in the negative or failed or refused to answer the same.

<i>Name</i>	<i>Birth date</i>
KIYONAGA, Yoshio-----	4/21/20
MATSUMOTO, Kameichi Kay-----	4/24/22
NAKAMURA, Anna Mieko-----	12/25/25
YOKOTA, (Nii), Shizuko-----	2/8/23

The above-mentioned persons applied for repatriation prior to July 1, 1943, and did not retract their requests prior to July 1, 1943.

<i>Name</i>	<i>Birth date</i>
HAMASAKI, Tomiko Rose-----	3/25/14
IKEDA, Tamotsu Tom-----	2/14/23
IKEJIRI, (Shizuka) Gladys-----	6/16/23
SHIGEI, Iwao-----	8/28/15

The above-named persons were denied leave clearance and applied for repatriation subsequent to July 1, 1943.

<i>Name</i>	<i>Birth date</i>
(ISHIBASHI) HATANAKA, Amy Murako_____	6/26/25
NAKAD, Fujiko June_____	4/6/23
SUZUKI, Takashi_____	10/2/22
MUNEKAWA, Satoru Ted_____	7/13/24

The above-mentioned persons were not affirmatively recommended for leave clearance by the Japanese-American Joint Board of the Provost Marshal General's Office.

<i>Name</i>	<i>Birth date</i>
TANIGUCHI, Masashi_____	8/2/19
TAIRA, Kotaro_____	3/18/17
ORIMOTO, Kozo_____	1/22/23
OKADA, Isao_____	9/4/15
NISHIOKA, Kuniaki_____	7/1/16
MUTA, Shinichi_____	6/3/22
MURAKAWA, Takeo_____	10/30/17
KUMASAKI, Tamotsu_____	2/4/21
KAGEURA, Yutaki_____	2/20/24

The above-mentioned persons were interned in Hawaii and were subsequently transferred to Tule Lake for the reason that at Internee Hearing Boards they made statements which indicated loyalty to Japan.

<i>Name</i>	<i>Birth date</i>
AREDAS, Daniel_____	4/1/24

[Omitted are the names of 43 plaintiffs designated in the Defendants' Supplemental Return to Court's Order to Show Cause filed in the District Court.]

The above-mentioned persons answered the said question 28 in the affirmative, were not denied leave clearance and therefore presumably were at the Tule Lake Center as a result of their own volition.

<i>Name</i>	<i>Birth date</i>
HAMASAKI, Nagisa_____	8/13/26

[Omitted are the names of 9 plaintiffs designated in the Defendants' Supplemental Return to Court's Order to Show Cause filed in the District Court.]

The above-named persons were not 17 years of age or older during the registration of citizens at reloca-

tion camps (February 1943 through March 10, 1943) and lacking further information concerning the reason for their presence at Tule Lake, the defendants, for present purposes, continue to rely upon the presumption of administrative regularity in executing the WRA Regulations set forth on pages 2 and 3 of their original Return, and say that such plaintiffs were at Tule Lake voluntarily.

<i>Name</i>	<i>Birth date</i>
NOMURA, James Susumu.....	2/25/25
SANO, Tome Louise.....	3/25/21
SHIMOMOTO, Tazuko Mary Snow.....	3/3/25
TAKAHASHI, Shigeo.....	4/12/16

With respect to the above-mentioned persons the defendants, as yet, have no knowledge why such persons were at Tule Lake and for present purposes continue to rely upon the presumption of administrative regularity in executing the above-mentioned WRA Regulations.

6. In Exhibits III, IV, and VI of the Defendants' "Designation of Plaintiffs" filed in this court on February 25, 1949, the names of certain plaintiffs hereinafter set forth were erroneously included therein. Such erroneous designation, together with a corrected designation is as follows:

<i>Listed erroneously in Exhibit III</i>	<i>Correct exhibit designation</i>
DOHI, Keiichi.....	XIII
KOSHINO, Masao.....	XIII

<i>Listed erroneously in Exhibit III</i>	<i>Correct exhibit designation</i>
MURAKAMI, Shigenobu.....	XIII
TAKIGUCHI, Fujiko (nee Maruyama).....	XIII

<i>Listed erroneously in Exhibit IV</i>	<i>Correct exhibit designation</i>
HAMACHI, Fusako.....	XV
OHATA, Toshiko (married name YOSHIOKA, Toshiko).....	XV

<i>Listed erroneously in Exhibit VI</i>	<i>Correct exhibit designation</i>
FUJIOKA, Tadashi.....	XV
NAKANISHI, Fumiko.....	XV
UYEKAWA, George.....	XV
IKE (KOSAKO) Kiyoko Kay.....	XIX

WHEREFORE, the defendants respectfully renew their submission that the Order to Show Cause should be

discharged and that the plaintiffs' Motion to Strike the Defendants' Designation should be denied.

NEWELL A. CLAPP,
Acting Assistant Attorney General,
 FRANK J. HENNESSY,
United States Attorney,
 ENOCH E. ELLISON,
Special Assistant to the Attorney General,
 PAUL J. GRUMBLY,
Attorney, Department of Justice,
Attorneys for Defendants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

No. 25294-G (Consolidated No. 25294-G)

TADAYASU ABO, ET AL., ETC., PLAINTIFFS,
v.

TOM CLARK, ETC., ET. AL., DEFENDANTS.

No. 25295-G (Consolidated No. 25294-G)

MARY KANAME FURUYA, ET AL., ETC., PLAINTIFFS,
v.

TOM CLARK, ETC., ET. AL., DEFENDANTS.

DEFENDANTS MOTION TO DISMISS

The defendants move the Court to dismiss these actions as to the individual plaintiffs whose names are set forth in the verified schedule attached hereto, made a part hereof and marked "Exhibit A", because

(1) such plaintiffs were not being denied rights of citizenship by anyone under the administrative con-

trol of the defendants, or either of them, within the meaning of the Act of October 14, 1940, 8 U. S. C. § 903, at the times that they became parties to these actions and, therefore, the Court lacks jurisdiction over the subject matter of these actions as to them; and

(2) the complaints fail to state claims within the jurisdiction of this Court upon which relief can be granted such plaintiffs.

The motion will be based upon the records and files herein and upon the memorandum of points and authorities filed in support thereof.

FRANK J. HENNESSY,
United States Attorney.

Assistant United States Attorney.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

No. 25294-G (Consolidated No. 25294-G)

TADAYASU ABO, ET AL., ETC., PLAINTIFFS,
v.

TOM CLARK, ETC., ET. AL., DEFENDANTS.

No. 25295-G (Consolidated No. 25295-G)

MARY KANAME FURUYA, ET AL., ETC., PLAINTIFFS,
v.

TOM CLARK, ETC., ET. AL., DEFENDANTS.

VERIFIED SCHEDULE

I, CHARLES M. ROTHSTEIN, having been duly sworn, depose and say:

That I am the Director of the Alien Enemy Control Unit in the Department of Justice;

That in such capacity I have control of, and personal knowledge of the contents of the files of said Department relating to the renunciations of citizenship by the plaintiffs named herein.

That as a result of the examination of the contents of such files, I state with respect to the following schedule that the dates of the release from custody of the respective plaintiffs and the dates of their becoming party-plaintiffs to these actions are as shown by such official records and correct to the best of my knowledge and belief.

<i>Name</i>	<i>Joined action</i>	<i>Released</i>
ADACHI, Toshiyo -----	March 4, 1946 -----	February 1, 1946

[Omitted are the names and dates of release and joinder to action of 605 additional plaintiffs designated in the verified schedule in the District Court. Each plaintiff was released prior to their becoming a party to this action.]

CHARLES M. ROTHSTEIN,
Director, Alien Enemy Control Unit.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this ---- day of -----, 1950:

48

MARY R. McLEAN.

APPENDIX E

HGM/EEE

146-54-5501

OCTOBER 25, 1949.

Re: *Acheson et al. v. Murakami et al.*

Your ref: *F130-Murakami, Miye Mae*

THE DEPARTMENT OF STATE,

Washington 25, D. C.

(Attention Mrs. Ruth B. Shipley,
Chief, Passport Division.)

DEAR SIRs: This is in response to your letter of September 9, 1949, and confirms the tentative views ex-

pressed to you orally by Mr. Enoch E. Ellison of the Claims Division of this Department in a telephone conversation on October 4, 1949. As you were informally advised on the last-mentioned date, the Solicitor General has determined that the Supreme Court will not be asked to review the decision of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

In view of the Solicitor General's ruling, this Department has decided not to oppose relief in future cases of this kind coming fairly within the decision of the Court of Appeals in the subject case, provided that the suits are within the jurisdiction of the courts. This, of course, does not apply to the cases of renunciants as to whom the Government files disclose evidence of loyalty to Japan or disloyalty to the United States. Such cases will be vigorously defended.

The record in the *Murakami* case, in addition to evidence relating to the general conditions of evacuation and residence in the War Relocation centers, consisted only of affidavits by the plaintiffs concerning their individual reasons for renouncing their citizenship and the pressures which drove them to such action. Among the questions posed to the Court of Appeals was that of whether or not such evidence on the part of the plaintiffs was sufficient to establish a *prima facie* case. Hence, the decision of the Court of Appeals affirming the judgment of the District Court by strongest implication approves stipulations for the use of affidavits in lieu of oral testimony in cases coming within the coverage of that decision. Accordingly, in future cases, where information in the Government's files taken together with affidavits which the plaintiffs wish to submit as evidence in lieu of oral testimony, bring the cases of such plaintiffs fairly within the coverage of the *Murakami* decision, this

Department will stipulate that the affidavits may be accepted in evidence and further will announce to the courts that in its view such cases are covered by the Murakami decision and, therefore, no objection will be interposed to the granting of relief. It is believed that this procedure will save the Government and the courts much expense and time in the trial of the numerous cases which are already pending and which undoubtedly will be brought.

Whether or not your Department will require the renunciants to obtain court adjudications as to their citizenship prior to the issuance of passports is, of course, a matter for you to decide. If you decide to apply the Murakami decision in that connection without requiring such judicial determination in each case, and if you desire to know the litigating position that this Department will take in particular cases, this Department will be happy to furnish you with an expression of such views as it may be able to formulate from the information available to it. In that event it would be helpful and, we believe, in most cases necessary to obtain from the applicant an affidavit which would be acceptable in lieu of oral testimony under the procedure described above.

Such an affidavit should not only explain the reasons and pressures which led to the renunciation but it should also explain, to the extent possible, actions which the renunciant might have taken from which inferences of disloyalty might be drawn. The affidavit should be specifically addressed to the circumstances of the particular case and should not consist of generalities. Although affiants should so state when they are uncertain as to matters related in their affidavits, normal inaccuracies of memory will not necessarily cause them to be disregarded. Where an affiant claims that any action was taken by him as the

result of fear, he should state in each instance, with the greatest possible particularity, what was feared and why. If it is claimed that the fears were caused by threats from individuals or groups of individuals, the nature of the threats, the names of the individuals making them, if known, and the time, place, and occasion for the making of the threats should be given. The affidavits should cover the following subjects:

1. Full name, date and place of birth of affiant.
2. If affiant was born prior to December 1, 1924, he should state whether or not he ever renounced his Japanese nationality and if so, where, when, and before whom such renunciation occurred. If applicant was born after December 1, 1924, he should state whether or not his parents caused his name to be registered with a Japanese consulate for the purpose of reserving his Japanese nationality and, if so, whether or not the applicant thereafter renounced his Japanese nationality, giving the same detail as to renunciation as in the case of persons born prior to that date.
3. If affiant has ever been in Japan he should state the dates and duration of each visit and the purpose of every such visit. He should also state the nature and extent of any formal education received in Japan.
4. If affiant at any time or times made application for expatriation or repatriation to Japan, he should state the reason or reasons therefor.
5. If at any time affiant expressly indicated that he would not swear unqualified allegiance to the United States or if he declined to answer, or gave a qualified answer to the question asked at War Relocation centers as to whether or not he would so swear, he should state the reasons for such action. If at any time affiant changed his answer to such question to "yes," or would have been willing to do so if the

opportunity had been presented, he should state his reasons therefor and the approximate time that he changed his mind. If affiant changed his answer to such question from "yes" to "no," or declined to change it from a "no" answer, or qualified answer, or a refusal to answer, to "yes," knowing that such change or failure to change would result in his being sent to the W. R. A. Segregation Center at Tule Lake, he should explain why he so acted.

6. If affiant at any time was a member of:

- Black Dragon Society (Kokuryu Kai),
- Central Japanese Association (Beikoku Chuo Nipponjin Kai),
- Central Japanese Association of Southern California,
- Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan) (Hokubei Kai),
- Heimuska Kai, also known as Nokubei Heieki Gimusha Kai, Zaibel Nihonjin, Heiyaku Gimusha Kai, and Zaibei Heimusha Kai (Japanese residing in American Military Conscripts Association) (Heimusha Kai),
- Hinode Kai (Imperial Japanese Reservists),
- Hinomaru Kai (Rising Sun Flag Society—a group of Japanese War Veterans),
- Hokubei Zaigo Shoke Dan (North American Reserve Officers Association),
- Japanese Association of America (Zaibei Nihonjin Kai),
- Japanese Overseas Central Society (Kaigai Dobo Chuo Kai),
- Japanese Overseas Convention, Tokyo, Japan, 1940,
- Japanese Protective Association (Recruiting Organization),

Jikyoku lin Kai (Current Affairs Association),
 Kibei Seinen Kai (Association of U. S. Citizens
 of Japanese Ancestry who have returned to
 America after studying in Japan),
 Nanka Teikoku Gunyudan (Imperial Military
 Friends Group or Southern California War
 Veterans),
 Nichibei Kogyo Kaisha (The Great Fujii
 Theatre),
 Northwest Japanese Association,
 Sakura Kai (Patriotic Society, or Cherry Asso-
 ciation—composed of veterans of Russo-Jap-
 anese War) (Cherry Blossom Society),
 Shinto Temples,
 Sokoku Kai (Fatherland Society),
 Suiko Sha (Reserve Officers Association Los
 Angeles),
 Hokoku Seinen-dan,
 Hokoku Joshi Seinen-dan,
 Sokoku Kenkyu Seinen-dan,
 Sokuji Kikoku Hoshi-dan,

he should state why he became such a member and,
 to the best of his recollection, the time, place, occasion
 and means whereby he became such a member. He
 should state also the nature of his actions in the
 organization and any offices that he might have held.
 If he at any time voluntarily discontinued such
 membership he should give the approximate date and
 reasons for doing so. If affiant claims that his
 membership, his actions, or his acceptance of any
 such office was due to misunderstanding of the pur-
 pose or nature of the organization and if he claims
 that he at any time wished to discontinue such mem-
 bership, activities, or office, but was prevented from
 doing so he should explain fully.

7. Affiant should give a full explanation of the reasons for, and the approximate time of, his decision to apply for forms upon which to renounce his United States citizenship. If such reasons were different from those stated to the officer who held the renunciation hearing, he should explain the reasons for such differences. If it is claimed that the renunciations were caused by fear, he should explain fully why such fear extended from the time of the application for renunciation papers until the date of actual renunciation and why, if such was the case, there was no effort to withdraw such renunciation, prior to the approval of the Attorney General. If after such approval the applicant asked the Attorney General to withdraw his approval or to cancel the renunciation, he should explain the reason why he delayed making such request.

8. If affiant has returned to Japan since renouncing his United States citizenship, he should state fully the reasons for such action.

9. Affiant should state whether or not he has taken any action to resume or to acquire Japanese citizenship, and if so, the nature of the action taken and the reasons therefor.

This Department will be pleased to receive any comment that you may care to make concerning its proposed program and to learn of any general decisions which you may make concerning the future handling of passport applications in such cases. We, of course, will be happy to extend any additional information or assistance that you may care to request.

Sincerely yours,

H. G. MORISON,
Assistant Attorney General
(For the Attorney General).

APPENDIX F

DEPARTMENT OF STATE,
Washington, Nov. 29, 1949.

In reply refer to
130-Japanese/326.

MR. H. G. MORISON,
*Assistant Attorney General,
Department of Justice,
Washington 25, D. C.*

MY DEAR MR. MORISON: Reference is made to your letter of October 25, 1949, File No. HGM/EEE, 146-54-5501, giving your views regarding the scope of the decision of the United States Court of Appeals for the Ninth Circuit.

You indicate in your letter that in view of the decision of the Solicitor General not to appeal the aforementioned decision, your Department has decided not to oppose relief in future cases of this kind coming fairly within the decision of the Court of Appeals. You also indicate that the cases of renunciants as to whom the Government files disclose evidence of loyalty to Japan or disloyalty to the United States are considered as not coming within the scope of the Murakami decision and that such cases will be opposed vigorously.

In view of the determination of the Solicitor General not to appeal the Murakami decision, this Department has reached the conclusion that it will recognize as an American citizen any Japanese renunciant who is able to bring his or her case within the meaning of the Murakami decision. For the purpose of determining whether an individual case comes within the meaning of the aforementioned decision, each renunciant will be required to execute an affidavit along the lines suggested in your letter. This affidavit, when

received, will be forwarded to your office for an expression of your views in the matter and upon the receipt of your reply, this Department will determine whether the subject should be documented as an American citizen.

The procedure mentioned above will apply to renunciants who apply for American passports in this country as well as to renunciants who apply for documentation as American citizens abroad.

Sincerely yours,

/s/ R. B. Shipley,
R. B. SHIPLEY,
Chief, Passport Division.

Enclosure:

Copy of this letter.

APPENDIX G

For Immediate Release: Wednesday, October 26, 1949.

DEPARTMENT OF JUSTICE

Attorney General J. Howard McGrath today announced that the Department of Justice will not ask the Supreme Court to review the recent decision of the United States Court of Appeals for the Ninth Circuit holding that three American-born women of Japanese ancestry continue to be United States nationals notwithstanding the fact that they renounced their citizenship during the war after having been evacuated from their homes in the West Coast Defense Area and placed in the War Relocation Center at Tule Lake, California.

This decision was handed down on August 26, 1949, in the case of *Dean Acheson, as Secretary of State, v. Miye Mae Murakami et al.*

The Court's opinion, which was written by Chief Judge Denman, stressed the findings of Judge Mathes of the United States District Court at Los Angeles, that plaintiffs were loyal American citizens who had been subjected to propaganda and abuse by pro-Japanese pressure groups while they were residents at the Tule Lake Segregation Center.

The Court said that fear of reprisal from such groups caused some of the renunciations and that others renounced because they feared prejudice and possible violence at the hands of the white population if they left the center.

These considerations led the Court of Appeals to affirm the decision of the District Court that the plaintiffs' applications for passports had been erroneously denied by the State Department.

While the Court of Appeals seems to have indicated also, that the evacuation program was influenced by race prejudice, the Attorney General made it clear that he did not concur in that view. He feels, however, that the facts found by both the District Court and the Court of Appeals to the effect that, although the plaintiffs did not wish to do so, they were actually driven to their decisions to renounce by fears engendered by intimidating activities of pro-Japanese groups at Tule Lake or hostility of Caucasians outside the center, constituted a sufficient basis upon which the courts could reasonably hold that the renunciations were coerced and were, therefore, invalid.

In further amplification of the position of the Department of Justice, Assistant Attorney General H. Graham Morison said that the decision of the Court of Appeals would be accepted and applied by it in all future cases of this kind brought within the jurisdiction of the courts.

This, of course, does not apply to any renunciant as to whom the Government files disclose evidence of disloyalty to the United States.

He explained that although application of the decision under the Attorney General's ruling requires the introduction of evidence as to the reasons for individual renunciations, the simplified procedure approved in that case could probably be made available to plaintiffs by stipulation in the vast majority of the cases coming within the scope of the decision, thus making it unnecessary for them to give oral testimony in Court.

Mr. Morison declined to express an opinion as to whether or not the Department of State would require other renunciants to obtain judicial adjudications of citizenship prior to the issuance of passports.

APPENDIX H

The pertinent regulations of the Attorney General of October 6, 1944, pursuant to 8 U. S. C. § 801 (i), read as follows (9 Fed. Reg. 12241; 9 C. F. R. (Supp. 1944) 316, *et seq.*):

§ 316.2 *Nationals permitted to apply for renunciation.* Any national of the United States may make in the United States a request in writing to the Attorney General, Department of Justice, Washington, D. C., for the form of "Application for Renunciation of United States Nationality."

§ 316.3 *Filing of application.* A completed and signed application for renunciation of United States nationality on the form prescribed by the Attorney General may be sent to the Attorney General, together with any certificate of citizenship, certificate of naturalization, certificate of derivative citizenship and

any United States passport which may have been issued to the applicant. An applicant will be notified if it is determined upon the application that the requested renunciation appears to be contrary to the interests of national defense.

§ 316.4 *Hearing on application.* A hearing will be conducted by a hearing officer, designated by the Attorney General, upon each application for renunciation which does not appear to be contrary to the interests of national defense.

§ 316.5 *Formal written renunciation of nationality.* After a hearing the applicant may file with the hearing officer, on a form prescribed by the Attorney General, a formal written renunciation of nationality and a request for the Attorney General's approval of such renunciation as not contrary to the interests of national defense.

§ 316.6 *Hearing officer's recommendation.* The hearing officer shall recommend approval or disapproval by the Attorney General of the applicant's request for approval of the formal written renunciation of nationality. The hearing officer, in making his recommendation, is authorized to consider not only the facts presented at the hearing, but also results of any investigation and any information which may be available to him in reports of Government agencies or bureaus, and from other sources, in the effect of renunciation of nationality relating to the applicant's allegiance and relation upon the interests of national defense.

§ 316.7 *Approval or disapproval by Attorney General.* The hearing officer's recommendation and the record of the hearing and any other facts upon which it is based, will be submitted to the Attorney General for his approval or disapproval of the applicant's formal written renunciation of nationality. A renuncia-

tion of nationality shall not become effective until an order is issued by the Attorney General approving the renunciation as not contrary to the interests of national defense.

§ 316.8 *Notice of Attorney General's decision.* The applicant will be notified of the Attorney General's approval or disapproval of the formal written renunciation of nationality. Notice of the approval of renunciation of nationality shall be given to the State Department, the Alien Property Custodian, Foreign Funds Control Section of the Treasury Department, and the Federal Bureau of Investigation and the Immigration and Naturalization Service of the Department of Justice. The notice to the Immigration and Naturalization Service shall be accompanied by any certificate of citizenship, certificate of naturalization or certificate of derivative citizenship issued to and surrendered by the applicant as required by § 316.3 hereof. Upon receipt of such notice and evidence of citizenship so surrendered, the Immigration and Naturalization Service shall notify the clerk of the court in which the applicant's naturalization occurred that the renunciation of nationality has been approved and the clerk of the court shall be requested to enter that fact upon the record of naturalization.

The notice to the Department of State shall be accompanied by any United States passport surrendered by the applicant as required by § 316.3 hereof.

§ 316.9 *Effective period of these regulations.* These regulations shall be effective from the date hereof and until cessation of the present state of war unless sooner terminated by the Attorney General.

FRANCIS BIDDLE,
Attorney General.

OCTOBER 6, 1944.

APPENDIX I

ANALYTICAL CLASSIFICATION OF PLAINTIFFS BY GROUPS
SHOWN IN DEFENDANTS' OFFERS OF PROOF SET FORTH
IN APPENDIX A THROUGH APPENDIX C, SUPRA

(1) The first group is composed of the 1,444 renunciants (covered by Exhibits I-VI, Appendix A, *supra*, who, instead of asking for mitigation hearings relative to their alien enemy removal orders, voluntarily went to Japan. Of this number 700 are Kibei, 93 of whom were leaders of pro-Japanese organizations at Tule Lake, and 327 were members. Of the 742 Nisei in this group, 76 were pro-Japanese organization leaders and 382 were members.

(2) The second group of plaintiffs is composed of the 2,780 renunciants, who renounced at Tule Lake (covered by Exhibits VII-XIX, as amended and amplified by subsequent pleadings) and who contested their removal orders by administrative mitigation hearings and *habeas corpus* proceedings. The following table gives a break-down of the special offers of proof as to this group:

Exhibit Nos.	Plain- tiffs covered by exhibits	Exhibit <i>Kibei</i>	Now under alien enemy removal orders ¹	Leaders of pro- Japa- nese organi- zations	Applied for re- patriation or ex- patriation prior to renuncia- tion	Applied for same after re- nounc- ing	Segre- gated because of answers to loyalty question	Same because denied leave clear- ance	Volun- tarily at center with family mem- bers
VII.....	6	6	6	6	6				
VIII.....	217	217	217		217				
IX.....	7		7	7	7				
X.....	1	1	1	1					
XI.....	69		69		10		50	6	3
XII.....	21	21		21	21				
XIII.....	1,066	1,066			1,066				
XIV.....	13			13	13				
XV.....	1,076				1,076				
XVI.....	7	7				7	7		
XVII.....	8			8		8	6		2
XVIII.....	11					11	8		3
XIX.....	278				4		199	17	58
Totals.....	2,780	1,318	2,300	56	2,420	26	270	23	66

¹ Removal orders are permissible under the Alien Enemy Act only where a renunciant was a dual national prior to his renunciation. The appeal in *Wiron v. ABO*, No. 12195, now pending in this Court, raises the question of whether any natural citizen of the United States can be a dual national under our law. However, a number of removal orders had to be revoked upon discovery that renunciants were not Japanese citizens under the law of Japan, in any event.

² Two plaintiffs in cause No. 12196 also are under removal orders, making a total of 302 such plaintiffs in these litigations.

(3) The third group consists of 83 plaintiffs (covered by Exhibit XX) who were not at the Tule Lake Segregation Center when they renounced.

(4) The final group (covered by Exhibit XXII) consists of eight plaintiffs admittedly lacking sufficient mental capacity to accomplish legally binding acts. If it should be held that the District Court has jurisdiction as to them, there would be no defense to their cases on the merits.¹

¹ A further group of seven plaintiffs whose renunciations the Attorney General had not approved (Exhibit XXI), was removed from the case by voluntary dismissal prior to judgment.



Nos. 12,251 and 12,252
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For the Ninth Circuit

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TADAYASU ABO, et al., etc.,

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and

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Appellees.
(Plaintiffs Below)

No. 12,251

No. 12,252

BRIEF FOR APPELLEES.

On Appeals from Judgment of the District Court of the
United States for the Northern District of
California, Southern Division.

WAYNE M. COLLINS,

Mills Tower, San Francisco 4, California,

Attorney for Appellees.

FILE

MAR - 6 1950

PAUL P. O'BRIEN,

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BRIEF FOR APPELLEES.

On Appeals from Judgment of the District Court of the
United States for the Northern District of
California, Southern Division.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOS- ING BASES OF COURTS' JURISDICTIONS.

These are appeals by the appellants in their official representative capacities as agents of the U. S. Government from final judgments and decrees entered April 12, 1949 (R. 482), in the district court below in *representative class suits* in equity authorized by Rules 1, 20, 23(1), 23(2), 23(3), 18(a), 18(b), 19(a) and 19(b), R.C.P., which rescinded the appellees' written renunciations of U. S. nationality and the written approvals thereof by the Attorney General, declared appellees to be citizens of the United States and enjoined the appellants from depriving them of their liberty and of their rights, privileges and immunities of national citizenship. The appellants have not obeyed the judgment below but persist in those deprivations which now are extended into the eighth year since evacuation with characteristic perversity.

The District Court below had jurisdiction of the suits under the provisions of 28 USCA, Sec. 41 (1), now Sec. 1331, 28 USCA, Sec. 400, now Sec. 2201, and 8 USCA, Sec. 903, and this Court has jurisdiction to review those decisions below by virtue of the provisions of 28 USCA, Sec. 1291.

The Opinion of the Court below (R. 410-427) is reported in 77 Fed. Supp. 806 and the Opinion of that Court in the companion proceedings in habeas corpus appear in 76 Fed. Supp. 664.

Nature of suits.

The suits primarily are in equity to cancel and rescind documents, namely, written renunciations executed by the

appellees and the written approvals thereof executed by the Attorney General, that is to say, suits to rescind, set aside and cancel the documents *inter partes*. Original jurisdiction so to do is invoked under 28 USCA, Sec. 41 (1), now 1331 and 1332. The controversy arises under the 14th and 5th Amendments, the provisions of 8 USCA, Sec. 801 (i), and Secs. 316.1 to 316.9, inc., of the Nationality Regulations.

In addition the suits also lie for declaratory relief under the declaratory judgment statute, 28 USCA, Sec. 400, now Secs. 2201-2202, for they involve an actual justiciable controversy between appellees and appellants. The latter originally asserted and still assert the validity of the renunciations of all the appellees and that renunciation deprived and still deprives each of U.S. citizenship and of all the rights of national citizenship. Until the actual release of all the appellees from internment after the suits were commenced in the court below the appellants asserted the right to restrain all of the appellees indefinitely and finally to remove them to Japan under the provisions of the Alien Enemy Act as though they were alien enemies. They still assert the right to remove 292 to Japan. The appellees' freedom of movement and other rights of citizenship still are denied to them by the appellants. *Perkins v. Elg*, 307 U.S. 325, is the leading authority that citizenship is determinable under this statute. Compare also, *Ng Fung Ho v. White*, 259 U.S. 276, 285, and *Lee Fong Fook v. Wixon* (CCA-9), 170 Fed. 2d 245, declaring a person is entitled to a judicial trial on his claim to be a citizen.

The suits also lie under 8 USCA, Sec. 903, to determine the U.S. nationality of the appellees as also to determine their citizenship rights. The appellants, by virtue of the renunciations, denied and still deny the citizenship of the appellees and deprived and still deprive them of all the rights, privileges and immunities of national citizenship. Their freedom of movement, the right to leave the continental limits of the U.S. and to return, the right to vote, to hold public office and all other civil rights still are denied to each of them by the appellants. See allegations of those deprivations, par. VIII (R. 99-102), and par. V (R. 97) of the amended complaint. Each of the appellees is deprived of all the rights of national citizenship to this day by the appellants. See *Brassart v. Biddle* (CCA-2), 148 Fed. 2d 134, 136; *Chin Wing Dong v. Clark* (DC-Wash.), 76 Fed. Supp. 648, 652; and *Ginn v. Biddle* (DCPa.), 60 Fed. Supp. 530, for authority that suits lie under this statute to determine nationality denied by government agents.

The pleadings necessary to show the existence of the jurisdictions are the amended complaint (R. 92); the answer thereto (R. 126); stipulation and order (R. 408a) submitting the causes for decision on the merits; opinion (R. 410); interlocutory decree (R. 430); designation filed Feb. 25, 1949 (see unprinted record or App. A to appellants' brief, p. 1); order requiring defendants to show cause why designations should not be stricken (R. 439), motion to strike designation of plaintiffs (R. 442) and affidavit in support thereof (R. 445); order striking defendants' designation of plaintiffs (R. 455); findings of fact and conclusions of law (R. 460); final order, judg-

ment and decree (R. 482); notice of appeal filed April 26, 1949 (R. 488), and order modifying judgment dated May 2, 1949 (R. 490).

Evidence upon which cases were submitted for decision on the merits of the causes aside from matters of which Court takes judicial cognizance.

The "Stipulation" (R. 408a) was entered into at the special instance and request of the appellants for the purpose of submitting the cause on the merits so as to obtain a final judicial determination of the issues involved and thereby avoid thousands of individual hearings which would be impracticable and would tie up the District Court for years in litigation. It was entered into following a number of conferences between counsel for the parties and the trial judge.

Under that stipulation the causes were submitted for decision "*on the merits and the present record as it stands, including any evidence by way of affidavits and exhibits submitted on the respective motions for summary judgment and for judgment on the pleadings*". By its terms the evidence submitted by the appellees consisted of the following documentary evidence in affidavit form offered on appellees' motions for summary judgment and on the pleadings and specified at R. 223-224 to consist of the following: (1) the original complaint (R. 2) with its Exh. 1 (R. 32); (2) supplement thereto (R. 62) with Exh. 2 (R. 75) and Exh. 3 (R. 82); (3) the amended complaint (R. 92), the said supplement and amended complaints each being specifically filed as affidavits "*for and on behalf of each and all*" of the plaintiffs and "*in lieu of filing separate affidavits by each individual plaintiff*" (see R. 224);

and the following affidavits, viz., of (4) Tetsujiro Nakamura (R. 225); (5) Masami Sasaki (R. 255); (6) Ernest Besig (R. 267); (7) Rev. Thomas W. Grubbs (R. 290); and (8) Ann Ray (R. 301). All of said evidence was introduced on the issues involved and no objections or exceptions thereto were taken by the defendants below.

In addition thereto, the plaintiffs below delivered to the court below the following documents of which it was authorized to take judicial notice, viz., "Final Report" of General DeWitt, H.R. 1911, H.R. 2124, and several volumes of H. Res. 113.

Under the stipulation the following documentary evidence was introduced on behalf of the defendants below, viz., affidavits of (1) John L. Burling (R. 147); (2) Charles M. Rothstein (R. 210); (3) Ollie Collins (R. 213); (4) Joseph J. Shevlin (R. 216); (5) Lillian C. Scott (R. 219); (6) Rosalie Hankey (R. 324); (7) Thomas M. Cooley, II, dated March 18, 1945 and filed March 24, 1947 (R. 403). The affidavit of said Thomas M. Cooley, II, dated Jan. 9, 1947 (not printed), was filed as part of the defendants' supplemental brief in the court below on Jan. 27, 1947. It was never offered as evidence by the defendants.

In addition to the foregoing the defendants filed with the court below a copy of "The Spoilage" by Dorothy S. Thomas and Richard Nishimoto.

The plaintiffs below filed objections and exceptions to and motions to strike (R. 318) defendants' said documents Nos. 1, 2, 3, 4, 5, and the affidavit of Thomas M. Cooley, II, included in defendants' points and authorities filed Nov. 12, 1946. The plaintiffs below also filed objections and

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exceptions and motion to strike and motions to suppress evidence illegally obtained (R. 397) to defendants' documents, to-wit, the affidavit of Thomas M. Cooley, II, dated Jan. 9, 1947, which was annexed to the supplemental brief of the defendants filed below on Jan. 27, 1947, and also to the said affidavit of Rosalie Hankey. Under the stipulation (R. 408a) only that evidence, if any, contained in the defendants' offered documents that was "*legally admissible as competent, relevant and material evidence against the objections and exceptions made thereto and against the motion to suppress*" could be considered and given any evidentiary weight by the trial court.

The fictitious designations.

We direct the attention of the Court to the following facts: The opinion (R. 410) of the court below was rendered and filed on April 29, 1948, giving the defendants 90 days within which to file a designation of any of the plaintiffs against whom they might wish to present further evidence. Up to August 17, 1948, several hundred additional parties plaintiff were joined to the suits by *stipulations* between the parties upon which joinder orders were obtained. (See R. 491-500 for 63 of these stipulations listing names and the unprinted record for the originals). On July 27, 1948, the defendants procured an order extending time (R. 427) to August 28, 1948, to file any such designations. On August 23, 1948, they obtained a like order (R. 428) extending their time 120 days so to do. Up to September 20, 1948, the Justice Department attorneys contemplated that they would treat a final district court decision of the causes as being dispositive of the rights of all citizens who had renounced because the suits were repre-

sentative class suits. Thereafter, however, they grew undecided on that matter. By September 27, 1948, the last joinder of parties plaintiff had been made by agreement between the parties.

From the opinion date (April 29, 1948) to September 27, 1948, counsel for the plaintiffs, pursuant to an oral agreement with attorneys for the Justice Department, refrained from entering the interlocutory decree simply to enable that Department to examine its files relating to each renunciant to ascertain whether it intended to file any such designation and to prepare it in the event it decided so to do. The interlocutory decree (R. 430) finally was filed on September 27, 1948, and the defendants therein were given 120 days therefrom within which to file any such designation upon oral representations being made to the court below that the Justice Department would complete a re-examination of its files within that period and determine whether it would file any designations. However, they failed to make up their minds and asked for a further extension of time and, although the matter was contested, they were given an additional 30 days' extension by an order extending time (R. 438) on January 25, 1949. On that date the Justice Department representative from Washington was present and requested another extension which was obtained, over the objection of plaintiffs' counsel, on the ground that additional time was necessary to complete a re-examination of the Justice Department files and ascertain whether any plaintiff or plaintiffs were to be designated. On February 25, 1949, the defendants filed what they now would have us believe was a genuine designation. (See unprinted record and also App. A to

appellants' brief). That designation was not a designation such as the defendants or the court below originally or at any time whatever contemplated or understood might be filed. It was nothing but a classified list of all of the plaintiffs which, in fact, on January 25, 1949, when the defendants applied for their last extension, actually was in the possession of the attorney sent from Washington to San Francisco to make that request for additional time and which had been granted after he had made specific representations to the court below, in conference, that if any designation was to be filed it would be a genuine one conforming to the type the court below had been informed would be filed if any designation was to be filed. See R. 445 at 449.

When the defendants had filed that spurious designation the plaintiffs interposed a motion to strike (R. 442) the designation filed Feb. 25, 1949, applied for and had issued an order (R. 439) requiring the defendants to show cause why it should not be stricken and a final judgment and decree entered for plaintiffs. The motion was supported by an affidavit of merits (R. 445). After the matter was argued orally the court below, having also actual knowledge of the facts, for good cause shown, made and entered its order striking defendants' designation of plaintiffs (R. 355) on March 23, 1949. Thereafter, proposed findings were lodged by both sides and, thereafter, the final findings (R. 460) which were discussed and formulated by both sides in conference with the trial judge were signed and thereupon the final order, judgment and decree (R. 482) was entered on April 12, 1949.

Appellants' peculiar proposal.

Instead of complying with the requirements of the judgments below the appellants, with cunning evasion to make it appear that they are endeavoring to do so, actually defy them and suggest counter measures. The proposal they make in their brief, reduced to its essence, is that this Court delegate its judicial functions to the Attorney General so that it may be transformed into administrative caprice and the appellants' citizenship be made dependent upon his whim. They have forgotten that paragraph XVIII of the answer (R. 134) alleges the Attorney General has no power to cancel renunciations because he has no power "to confer citizenship on persons who have lost it". They also appear to have forgotten their long time anxiety and persistent efforts to have the causes submitted to the trial court for decision on the merits of the issues for the precise purpose of precluding individual hearings, as evidenced in the stipulation at R. 408a. It is a strange proposal they now make when it also is recalled that for five continuous years the appellants have persisted in depriving the appellees of their citizenship status and rights and continue so to do. They must be aware that judicial functions cannot be delegated. *Holiday v. Johnston*, 313 U.S. 342, 352. Perhaps they assume the appellees are naive enough to disregard the judgments below and cast themselves upon the Attorney General's peculiar quality of mercy which to this date has been withheld so grudgingly. In other words, appellants' counsel would substitute their newly-begotten administrative whims for the judicial wisdom of the trial judge as resolved in the judgment. We are not quite that naive.

Appearances of defendants below.

All the defendants named in the complaint (R. 2, 4) appeared in the proceedings below. Counsel for the defendants, having orally *consented to appear for all the defendants*, did so in stipulations on Dec. 31, 1945 (R. 57), and on Jan. 2, 1946 (R. 61); in stipulations that service of supplement to complaint (R. 62 at 86) be deemed "made on defendants" on March 4, 1946; stipulations of March 14, 1946 (R. 86-7 and 87-8); in acknowledgments of service of copies of the amended complaints for and on behalf of "each of the defendants" (R. 92 at 122-3) on Aug. 15, 1946; in stipulations (R. 124-5) of Aug. 15, 1946; on Sept. 19, 1946, the U. S. Attorney as attorney for the "defendants" filed a motion to strike (R. 125-6) on behalf of all the defendants; in acknowledgment of service of copies of motion to strike (R. 139 at 142) on Oct. 10, 1946; in acknowledgments of service of motion for summary judgment (R. 143-144) on Oct. 14, 1946, and in the notice of hearing of motions (R. 145-6) on Oct. 16, 1946.

Counsel for defendants below filed an answer (R. 126) for defendants Clark, Hennessy and Wixon on Oct. 10, 1946. (R. 142.) The reason why they did not file specific answers for the other defendants is simply that the Justice Department lawyers, after conferences with the other defendants, were informed that the Secretaries of the Interior and State and the other defendants were opposed to contesting the suits. Thereafter, on Dec. 10, 1946, the defaults of defendants Best and Myers were entered. (R. 222.) Instead of taking judgment by default against any of the defendants the plaintiffs elected to have the causes

submitted to the trial court for decision on the merits. See stipulation (R. 408a) of Oct. 10, 1947, which was solicited and approved by the Justice Department attorneys.

Counsel for the defendants ("respondents") below also filed a cross-motion for summary judgment (R. 146) on Nov. 12, 1946 (R. 221), accompanied by affidavits (see filing date of Nov. 12, 1946, at R. 221); on Jan. 29, 1947, attorneys for "defendants" acknowledged receipt of copies of objections and exception to evidence, motion to strike and motion to suppress evidence illegally obtained. (R. 401.)

Between Dec. 31, 1945, and Aug. 17, 1948, in excess of 63 stipulations were entered into between the counsel for the defendants and plaintiffs for the joinder of parties plaintiff. (See R. 491-500 for reference to these and the unprinted record for the originals as well as for a considerable number of stipulations extending time, for substitution of parties defendant, etc., and for acknowledgments of service executed by counsel for the defendants.)

Counsel for the defendants below never at any time whatever withdrew or filed any withdrawal of representation of any of the defendants. Having appeared for all of them they took appeals (R. 488) for all of them. The court below made a finding (par. 2 at R. 468-9) that all the defendants appeared in the suits below. That finding is fully supported by the record itself as also by matters of which the trial judge had personal and judicial knowledge and, as such, cannot be set aside. See Rule 52(a), R.C.P.

Appellants' disregard for facts.

The footnote on page 80 of the brief for appellants contains a series of sly misstatements that are the product of the ignorance or of the malice of those who prepared it. Answering them seriatim: The basis for assuming the parties plaintiff desire to set aside their renunciations is the letters they sent to the Attorney General cancelling them as alleged in par. XII of the amended complaint (R. 118) and the admission of the truth of that allegation contained in par. XVIII of the answer at R. 134. In addition thereto, the verified complaint (R. 2), the supplement thereto (R. 62) and the amended complaint (R. 92) are notices thereof. Attention also is drawn to the fact that the Justice Department has in its files the original letter sent to the Attorney General by each renunciant notifying him of the rescission thereof and the grounds therefor. See Burling affidavit, R. 192-193. Further, appellees' counsel wrote letters of cancellation for each. See R. 32. In view of these facts it ill becomes appellants' counsel either to ignore, to evade or to deny the facts.

The presumption counsel for appellants have indulged in that appellees' counsel cannot vouch for requests for representation is not only presumptuous but is fictitious to boot. Suffice to state that each appellee authorized counsel to represent him or her in person and by writing or by a writing in the form of not less than one letter sent by mail or by courier to him or by delivery to him in person and also by the filling out of a personal history questionnaire. In addition thereto, each appellee conferred with counsel either at Tule Lake, Bismarck, Santa Fe,

Crystal City, Bridgeton or San Francisco or at more than one of said places.

The statement in appellants' brief that the four plaintiffs there named or that any of them at any time whatever entered a dismissal of their judgments in the court below or here is a barefaced falsehood. The records contain no such dismissals. Apparently there is no level to which counsel for appellants who prepared that brief would not stoop to make a false insinuation against appellees' counsel and to mislead the court.

When the causes are completed the appellees' histories are destined for the archives of the University of California and Columbia University so that whoever in the future may be interested in delving into the outrages committed by the government and its all too willing agents against the appellees will find truer data concerning that oppression than has been published and than elsewhere exists. A copy of the record, printed and unprinted, and of appellants' and appellees' briefs will be added to those files by appellees' counsel to direct the attention of future historians to the verifiable falsity of those charges so as to reveal that those irresponsible government tools who have been guilty of such reprehensible conduct not only lacked an appreciation of the truth but actually shunned it. It is evident that although certain attorneys may be in the pay of the government that fact in and of itself is not a guaranty that they have a predilection for truth and veracity or that they are anything other than hirelings.

QUESTION INVOLVED.

Are wartime renunciations of U.S. nationality executed under 8 USCA, Sec. 801(i) by adult, infant and insane appellees void for being the direct and proximate result of the duress in which they were held and to which they were subjected by the Government during an unconstitutional internment imposed upon them simply because they were of Japanese lineage?

PRELIMINARY STATEMENT.

The United States Government, which as children we had been taught was devoted to "liberty and justice for all", has been guilty of grave injustices and of serious offenses against the appellees and, consequently, against the nation and humanity. It has been guilty of something infinitely worse. It has betrayed the great principle of equal justice upon which this Republic was founded.

It made innocence a crime and prescribed imprisonment for an indefinite period of time as its punishment. It drove the appellees and some 130,000 other innocent men, women and children from their homes, cheated them of their possessions, impoverished them, deprived them of their liberties and goaded them into concentration camps. It sanctioned lawlessness against them. It delivered them into peonage. It kept them in a constant state of fear, terror and despair. It forced a number of them into insanity. It defrauded thousands of citizenship and then scheduled them for deportation and now threatens a number of them with removal to Japan.

All this mistreatment and abuse was visited upon them simply because they are descended from ancestral lines containing progenitors who were inhabitants of the land known as Japan. The lines transmitted a few more of the genes responsible for pigmentation than those transmitted by Anglo-Saxon and Mediterranean stocks. Apparently this, in some unexplained manner, seems to render the yellow-citizen an inferior and the white-citizen a superior being and justifies on "racial" and, therefore, necessarily on "constitutional" grounds, the drawing of a division line between the two types. This evidently authorizes executive officials to discriminate against them whenever the caprice of the moment demands. We believe, however, that the mistreatment of these citizens is not to be attributed so much to the abnormality of the times as to the abnormality of the minds of those responsible for this outrage. Apparently these officials reposed little confidence in the Constitution and disbelieved in the Sermon on the Mount while beguiled by the Rosenberg lies of white supremacy.

It is possible that the most priceless possession in the world today is American citizenship, but, whether so or not, it was the last possession in which the unfortunate appellees were permitted to take pride. Then it, too, went the way of their property rights and civil liberties and for the same reasons. They long had been deprived of it before signing formal applications for renunciation of United States nationality. The substance and significance of citizenship had been abstracted when they were compelled to surrender and surrendered all that remained of it—a meaningless name. Imprisonment of innocent per-

sons for an indefinite period of time without hope of release breeds despair. Renunciation of citizenship was not the product of disloyalty or hostility on their part but of hostility to them on the part of the Government. It was the result of fear induced by governmental duress concurrent with the internal duress of pressure groups in the Tule Lake Center which was exerted upon them with the full knowledge of the governmental officials in charge of them and without protection against that terror having been given them by the Government.

The proximate cause of the renunciations by the appellees was governmental duress, a duress initiated by a military commander, ignored by the Congress, supported by executive agencies and sustained by the courts in complete defiance of the letter and spirit of the Constitution.¹ That document, once considered a noble charter of human rights, no longer is a law for rulers and the ruled. It is become a reference work for the use of the historian. It is become the habit to ignore it because, by such an omission, anything can be justified. Transgressions upon its guaranties are excused simply by declaring governmental errors to be the products of historic necessity. Matters of political expediency, masquerading under the name of "public necessity" or "military necessity", based upon the fiction of necessary governmental or military secrecy, find acceptance in dictatorial minds. It is such minds, however, that form the real source of danger to the prin-

¹In *Korematsu v. U. S.*, 323 U. S. 214, the Supreme Court committed a serious error. It upheld the supremacy of the personal caprice of a military commander over general law. Rationalizing injustice may be politically expedient but it is a travesty on constitutional principles.

ciples of justice and equality that characterize our republican democracy. The nation has far more to fear from those whose crime is the destruction of constitutional rights than from those whose criminality consists of mere statutory violations. The former offend the nation and are left at large while the latter offend the individual and wind up in jail.

There are those who wear the mantle of American citizenship who believe it entirely proper that the yellow-skinned citizen should cringe at the feet of the "superior" white man and that all his rights should be sacrificed on the fictitious plea that it might serve the common weal. They do not believe, however, that a like sacrifice should be made by the white man.

Abnormal times beget abnormal results when abnormal minds are permitted latitude in dealing with citizens they are suffered to command. Law simply did not exist for these people—they were subjected to the arbitrary rule of executive officers and agencies. Whim and caprice and their servants, command and order, became the substitutes for law and these had the backing of bayonets to force obedience. Our Nisei expected a few ignorant persons to discriminate against them. They never dreamed, however, that the Government itself would discriminate against them, would repudiate them, would treat them as though they were alien enemies and do violence to them without cause. We learned to scorn a Germany which, under the lash of the late Herr Hitler, was guilty of abusing segments of its own citizenry for "racial" reasons. We were inured, however, to a like abuse of our own citizens by

our own Government. It is strange that the barbaric treatment of German citizens by the German government earned our scorn while our own barbaric treatment of Americans of Japanese descent appears to have gained our praise.

While hounding individuals whom it accused and tried for the commission of "war crimes" throughout a goodly portion of the "civilized" world the Government diverted attention from the crimes of which it had been guilty at home.² Now that the war is over, perhaps we yet may be able to renew our faith in intellectual honesty and the long abandoned principles of democracy. Mayhaps we may even recover a measure of our integrity.

OUTLINE OF OUTRAGES COMMITTED BY THE UNITED STATES AGAINST ITS OWN CITIZENS.

It is significant that in November, 1941, when war with Japan was imminent and the Japanese government sent ships to our shores for the purpose of evacuating her citizens that not one of our resident nationals of Japan

²General Yamashita, one-time conqueror of the Philippines and Malaya, was tried by a United States military tribunal in Manila after the cessation of hostilities when the Philippine civil authorities had been restored to their posts. He was convicted by a military jury of his peers and sentenced to death for condoning the personal crimes of subordinate officers and men albeit the Supreme Court, in *Ex parte Quirin*, 317 U. S. 1, had declared individual guilt to be the test of criminality. *Yamashita v. Styer*, 327 U. S. 1. If Yamashita, an executive officer of his own government, was punishable by our government for condoning offenses of which he probably knew nothing what is to be said of our own government and officials who not only condoned the crimes of our government against our native born citizens but actually aided and abetted and were accessory to and directly responsible for their plight?

or their children accepted the offer. Only a few alien Japanese who were temporarily visiting our shores accepted the offer. See *H. Res. 113*, pp. 11452, 11447. That fact eloquently expressed the loyalty and desire of our resident Japanese to remain in the United States at that most critical time. The applications for repatriation made by a number of aliens four years later in 1945 was the result of the long and unnecessary internment inflicted upon them. The requests for passage to Japan made by citizens in 1945 was an act of despair resulting from four long years of what cannot be viewed other than as an attempted complete repudiation of their citizenship unjustly made by the executive branch of the U. S. Government.

The storm of war struck us on December 7, 1941.³ Immediately the President enjoined Japanese nationals within our jurisdiction to preserve the peace and pro-

³On December 7th resident Japanese nationals and citizens of Japanese ancestry went through the first baptism of fire in the late war. Many were slain by the enemy air-attack and many were wounded, it being known that they suffered more civilian casualties than all of the other ethnic groups combined. See Andrew W. Lind's "The Japanese in Hawaii Under War Conditions", 1943, American Council Institute of Pacific Relations.

It is pertinent to the issues herein that on that eventful day there were thousands of American citizens of Japanese lineage serving in our armed forces. Not fewer than 300 were serving in the far Western Pacific, in G-2, the military intelligence service, a fact which must have been known to General DeWitt. In addition to those serving in the National Guard in Hawaii many there were serving in the Territorial Guard of Hawaii. Thousands on the continental United States long prior thereto had registered under the Selective Training and Service Act of 1940 and had been called to the colors. In excess of 5,000 were serving in the military forces on the mainland United States and in Hawaii at the time. (See letter of the President to the Secretary of War dated February 1, 1943, and H.R. 2124, p. 143.)

hibited them from possessing firearms, ammunition, signal devices, cameras, short wave radios and other articles of a contraband nature. (Public Proclamation No. 2525, 6 F.R. 6321.) On December 8, 1941, he placed similar injunctions upon German and Italian nationals within our jurisdiction. (Pub. Proc. No. 2526, 6 F.R. 6323, and No. 2527, 6 F.R. 6324.) These proclamations were issued under authority of the Alien Enemy Act, 50 USCA, sec. 21. They delegated authority to the Attorney General to enforce the provisions thereof on the mainland and the Secretary of War on our outlying possessions. (See H.R. 2124, pp. 294-300.) On Dec. 8, 1941, Congress declared war on Japan. On Dec. 11, 1941, Germany and Italy declared war on the United States. On the same day Congress retaliated by declaring war on them.

Following the outbreak of war the Department of Justice promptly apprehended alien enemies deemed to be dangerous to our security. A total of 12,071 Axis nationals were taken into custody under the authority of the Alien Enemy Act, were interned in special internment camps in North Dakota and elsewhere and were given prompt individual administrative hearings by the department. A majority of these finally were released during the war upon a finding they were not hostile to our security.⁴

⁴Several hundred alien Japanese (Issei) residents were detained throughout the war under the arbitrary classification of being dangerous alien enemies under a claim of authority of the Alien Enemy Act at Bismarck, Santa Fe, Tule Lake and elsewhere. Intervention on their behalf resulted in the release of a majority during 1946. Thereafter those of the group still detained who were in good health were permitted to obtain gainful employment on "relaxed internment" at Seabrook Farms, N.J., while the physically infirm re-

On January 5, 1942, General J. L. DeWitt wrote Assistant Attorney General James D. Rowe, Jr., stating that the Army did not wish "to undertake the conduct and control of alien enemies anywhere within continental United States". See his *Final Report*, p. 19. By letter of February 12, 1942, however, he wrote the War Department suggesting that a method be developed "to provide for the evacuation from sensitive areas of all persons of Japanese ancestry". (*Final Report*, p. 25.) His utterly incredible hatred of Japanese descended persons, all of whom he viewed as enemies, is revealed in that letter. See his *Final Report*, p. 34, wherein he brands them as non-assimilable racial enemies, ready to engage in hostile acts against us, and states that "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken". His idea of "sensitive areas" was to expand until it included Alaska and eight western states. His infamous "Jap is a Jap" speech, reported in the San Francisco News of April 13, 1943, leads us to believe that if unchecked he would have excluded this minority from the country and, that if he could have had his way, from the earth.

On January 14, 1942, the President, by Public Proclamation No. 2537 required all alien enemies to acquire

remained at Crystal City, Tex. Inasmuch as these were under removal orders issued by the Attorney General habeas corpus proceedings were instituted on their behalf at Philadelphia, Pa., on January 1, 1947, and Del Rio, Tex., on February 1, 1947, to pry them loose from internment and prevent their impending removal to Japan. Thereafter, pursuant to arrangements entered into between the Attorney General, the USI&NS and their counsel all of them were released into the custody of their counsel on September 30, 1947, and thereupon returned to their respective homes. Thereafter, with two exceptions, the removal orders were rescinded by the Attorney General.

identification certificates. Between January 29 and February 7, 1942, the Attorney General, under authority delegated to him by the President set up zones upon the Pacific littoral and restricted the activities of all alien enemies therein. (H.R. 2124, pp. 302-314.) The restrictive areas encompassed national defense material, premises and utilities defined in 50 U.S.C.A., secs. 101, 102, a statute entitled "Willful Destruction of War or National Defense Material", a violation of which was punishable by 30 years' imprisonment and \$10,000 fine under sec. 102 or a like sum and 10 years under sec. 105. The declared purpose of setting up these prohibited zones was to prevent acts of espionage and sabotage to such material, premises and utilities. These proclamations had a reasonable relation to national security and were properly invoked under the Alien Enemy Act. On February 4, 1942, the Attorney General announced that an area extending from 30 to 150 miles inland from the Pacific shoreline had been declared a "restrictive area". On the same day he established curfew regulations and placed travel restrictions upon all alien enemies residing therein. (H.R. 2124, p. 310.) Approximately 10,000 German, Italian and Japanese nationals departed from the forbidden areas. These alien enemies were not confined to concentration camps. (H.R. 1911, p. 2.)

In February, 1942, it was rumored that General DeWitt might desire an evacuation of "all Japanese" from the west coast. This caused a degree of hysteria among the Japanese descended persons in our midst. Avarice, that incentive to pillage, was aroused by the rumor—and human harpies flew to the scene to prey upon the misery

and profit by the misfortune which was about to be visited upon these people. The rumor gave license to loot. The affected persons, apprehensive of what the future had in store for them, disposed of their properties and possessions on a distressed market at 5 to 10 cents on the dollar. Millions were lost to the swindlers who flocked to the west coast attracted by the prospect of plunder. Eight years having elapsed since then a faint trace of governmental sanity has been recovered.⁵ Congress has made a gesture towards compensating the victims for the loss of their properties but has not indicated any repentance for their loss of rights and liberties. The congressional purse-strings, however, were not loosened with abandon or generosity but with a cautious reluctance. See Act of July 2, 1948, 62 Stat. 1231, relating to Japanese Evacuation Claims.

⁵While detained in the WRA Centers and various alien internment camps a large number of Japanese aliens were discovered either to have entered the country illegally or to have lost their admission status as a result of the war. These were seized by the immigration authorities and held for deportation on claimed violations of our immigration laws. Following the commencement of a series of test proceedings in habeas corpus (Nos. 26019-26022) in the District Court below on May 29, 1946, all of these were paroled to their counsel. Thereafter, the government, faced with the possibility of a judicial determination against their deportability on one hand and the possibility that if they were held to be deportable that Caucasian violators of our immigration laws in like circumstances would also be deportable, hesitated to force the issue. Thereafter, Thomas M. Cooley II of the Justice Department, having grown sympathetic to the plight of these long time residents, was instrumental in initiating relief legislation in Congress which rendered them eligible to apply for a suspension of deportation and permanent resident status in this country. See Title 8 *USCA*, Sec. 155(c), as amended July 1, 1948, 62 Stat. 1206.

The false arrest and imprisonment.

On February 19, 1942, a bill, S. 2243, providing for the detention of any or all Japanese was introduced but failed to pass in the Senate. See 88 Cong. Rec., S. Rep. No. 1496, Calendar No. 1541. Reintroduced June 18th and debated it was rejected on June 20th.

On February 19, 1942, in order to provide for the transportation, food, shelter and other accommodations of persons who might be prohibited from leaving or entering military areas which might thereafter be prescribed by the Secretary of War or military commanders designated by him, the President issued Executive Order No. 9066. See 7 F.R. 1407. This order appears to have been intended to ratify and approve the restrictive action taken against alien enemies by the Attorney General pursuant to presidential Proclamations 2525, 2526 and 2527. Its preamble declared its purpose was the taking of every possible protection against espionage and sabotage to national defense material, premises and utilities.

It is from this executive order, however, that General DeWitt's savage evacuation and imprisonment program stems. It has no constitutional source. The military action taken thereunder which abridged practically all the constitutional rights of some 73,000 citizens on a "racial basis" is not sanctioned by the Constitution. It was nothing but an expression of reckless autocratic power. The order was an executive experiment in the usurpation of extra-constitutional power. If the late President Roosevelt was informed of the sinister purposes to which his order was to be put he will be known to history as the father of the vicious "racial" doctrine of inequality which

in *Korematsu v. U. S.*, 323 U.S. 214, won the temporary support of a majority of the Supreme Court justices and already has earned that court some of its severest criticisms.⁶

On March 2, 1942, General DeWitt set up Military Areas Nos. 1 and 2 and required alien enemies and citizens of Japanese ancestry in Military Area No. 1 to give notice of change of residence. (Public Proclamation No. 1, 7 F.R. 2320.) This was the first discrimination against citizens of Japanese ancestry and the first act by which an executive official classified and treated our own citizens as though they were "alien enemies". We could expect errors of judgment to be made by a lieutenant general but we never expected deliberate malice to be displayed.

On February 27, 1942, the California State Board of Equalization arbitrarily revoked all alcoholic beverage licenses held by citizens of Japanese lineage. On March 4, 1942, the California State Personnel Board capriciously dismissed 88 civil service employees because of their Japanese ancestry. (The case of *Ex parte Endo*, 323 U.S. 283, was instituted to test the validity of their dismissals and loss of tenure.) The contagion of such discriminatory practices spread to other states, organizations and individuals. American Legion posts dropped the names of veterans of Japanese ancestry from their membership

⁶See: "Americans Betrayed" by Morton Grodzins, Univ. of Chicago Press, 1949; "Racial Discrimination and the Military Judgment" by Nanette Dembitz, 45 Columbia Law Review 175; "The Japanese American Cases—A Disaster" by Eugene V. Rostow, 54 Yale Law Journal 489; "Our Worst Wartime Mistake", by Eugene V. Rostow, in Harper's Magazine, September, 1945.

rolls. One post composed of veterans of Japanese ancestry was deprived of its charter. A jingoist press steadily sought to whip up the spirit of vigilantism against our Japanese population.

Thereafter, on March 16, 1942, General DeWitt set up four additional military areas, viz., Military Areas Nos. 3, 4, 5 and 6, and required of like residents therein a similar giving of notice of change of residence. (Public Proc. No. 2, 7 F.R. 2405.) This was the second discriminating federal action taken against our citizens of Japanese ancestry whereby they were unwarrantedly classified and treated as though they were "alien enemies". The military department so set up embraced eight western States and Alaska and comprised in excess of one-fourth of the total geographical area of the continental United States. In this department the general played the rôle of an arbitrary and merciless ruler over our citizens of Japanese lineage although he did not dare to do so over citizens of Caucasian lineage.

On March 18, 1942, the President issued Executive Order No. 9102 (7 F.R. 2165) establishing the War Relocation Authority, an executive office, "to formulate and effectuate a program for the removal from military areas designated by military commanders of persons or classes of persons designated under Executive Order No. 9066. Under this order the director of the W.R.A. was vested with authority to provide for the relocation, maintenance and *supervision* of all persons deported from the military areas. He was authorized also by its terms to establish the W.R.A. Work Corps, to prescribe the work to be

performed by the evacuees in the corps and the compensation to be paid.⁷

The House of Representatives "Select Committee Investigating National Defense Migration", commonly called the Tolan Committee, reached the conclusion that if an evacuation of our citizen and alien Japanese population were to be put into operation such a program finally must result in their mass deportation to Japan and warned against it. See H.R. No. 1911, page 16, 77th Congress, 2nd Session, printed March 19, 1942, pursuant to H. Res. 113, reading, in part, as follows:

"The incarceration of the Japanese for the duration of the war can only end in wholesale deportation. The maintenance of all Japanese, alien and citizen, in enforced idleness will prove not only a costly waste of the taxpayers' money, but it automatically implies deportation, since we cannot expect this group to be loyal to our Government or sympathetic to our way of life thereafter."

"Serious constitutional questions are raised by the forced detention of citizens against whom no indi-

⁷Although internees recruited to perform seasonal work outside the W.R.A. concentration camps which were set up were paid the low wages their labor would fetch in the labor market created by such conditions those who were employed in the concentration camps received either \$12, \$16, or \$19 per month and no more although they labored eight hours per day. (W.R.A. Manual, Chap. 50.5, Par. 6-A et seq.) Labor unions and the government were quite indifferent about the miserable peon wages and the provisions of the 13th Amendment forbidding slavery and involuntary servitude insofar as these citizens were concerned simply because by the accident of birth they were of Japanese descent. From the Government's viewpoint it was quite all right to exploit these citizens because it viewed them as "alien enemies" and, therefore, as though they were mere chattels because they were not born of "Caucasian" parents. At the Tule Lake Center the W.R.A. officially set up a slave labor racket and exploited internees for private profit. (R. 285-286.)

vidual charges are lodged. Such detention must lead logically to an attempt to withdraw citizenship and ultimately to deportation of all members of the group."

What this congressional committee foresaw as the logical result of the evacuation-imprisonment program which a short time later was formulated and carried into execution by a military commander was the inevitable result of that program. Its admonition also was a prognostication that would have been fulfilled except for the halt called to the removal program by these suits in the court below. Ultimate mass deportation as their destiny was what the evacuees expected when the evacuation program was launched. In spirit and in reality the program was a governmental repudiation of the citizenship rights of all the evacuee citizens and, therefore, of citizenship itself. This fact must be borne in mind in endeavoring to understand the mental reaction of this much abused minority in connection with all that has transpired since the vicious program was initiated. The Administration is responsible for the relentless persecution of this minority for a period of eight consecutive years and all that has happened to them is the proximate result of that persecution. Apparently it is proud of its history of oppression.

On March 21, 1942, Public Law No. 503, now codified as Title 18 U.S.C.A., Sec. 97A, became effective. It made it a misdemeanor for anyone, contrary to a military commander's orders, to enter or to leave a military area prescribed by him. This statute was nothing but a bill of attainder repugnant to Art. 1, Sec. 9, cl. 3 of the Consti-

tution and to the due process clause of the 5th Amendment as construed and applied to citizens on an ancestral origin basis. It was designed to serve as the enforcement machinery for reckless military fiat. The legislative history of the statute is a sorry story of evil objectives. It is significant that when Congress first was informed that General DeWitt desired its enactment the curfew feature was stressed as its chief objective. See letter of the Secretary of War of March 14, 1942, addressed to the House Committee on Military Affairs (H.R. 2124, p. 168) stating the general desired the passage of S. 2352 and H.R. 6758, which became Public Law No. 503, to enable the enforcement of "curfews and other restrictions" in military areas. On the basis of this indirect supposititious notification to Congress the Supreme Court decided, in *Hirabayashi v. U. S.*, 320 U.S. 81, that Congress contemplated the enforcement of a curfew and read this into the statute by implication. No such inference can be drawn, however, that Congress contemplated, understood or intended that it would be used to enforce a mass evacuation program which from its inception to its conclusion was nothing but a vast imprisoning program for our Japanese population.

Congress was not informed that General DeWitt intended or desired to institute a generalized imprisonment program for all Japanese descended persons. The first notice that any member of Congress had that anyone was to be evacuated was gleaned from the reading of a Washington newspaper report on March 19, 1942, that the general was going to evacuate a limited number of aliens and citizens from the Los Angeles area "early next

week". See 88 Cong. Rec. 2722-26. The report was erroneous for none were excluded from that area until April 5, 1942, pursuant to Civilian Exclusion Order No. 2. See H.R. 2124, p. 334. The congressional committee reports are barren on the subject of evacuation. Congress neither expressly nor impliedly authorized the imprisonment of these people, a matter which was not even in its contemplation when it passed Public Law No. 503. It is significant that on June 18, 1942, S. 2293 which sought the taking into custody of all Japanese was introduced into the Senate and was rejected. (88 Cong. Rec. 5317.) On June 22, 1942, the bill was debated and rejected, it being pointed out that the passage of such extreme legislation would constitute "winking at the Constitution". (88 Cong. Rec. 5427-29.) The bill was the product of chicanery. The "winking" was done by the general, the War Department and, finally, by the Supreme Court in *Korematsu v. U. S.*, 323 U.S. 204.

How the Government duress arose.

On March 24, 1942, Public Proclamation No. 3 (7 F.R. 2455) imprisoned all the plaintiffs as "persons of Japanese ancestry" in Military Areas Nos. 1 to 6, inclusive, in their places "of residence between the hours of 8:00 P.M. and 6:00 A.M., i.e., during "hours of curfew", and at all other times "such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than *five miles* from their place of residence." This was a military imprisoning order that remained in full force and effect until January 2, 1945, when General H. C. Pratt's Public

Proclamation No. 21 issued on December 24, 1944, revoked the mass exclusion orders hereinafter mentioned. The proclamation threatened violators of its provisions with exclusion from the military areas described therein, apprehension and prosecution under Public Law No. 503. (18 USCA, sec. 97a.) It further treated all "persons of Japanese ancestry" as alien enemies by prohibiting to them the possession, use and operation of firearms, weapons, ammunition, short-wave radios, radio transmitting sets, signal devices, codes or ciphers and cameras. Violators of such provisions after March 31, 1942, were threatened with prosecution under Public Law No. 503. If an alien violated the order he was subject to internment. If a citizen violated the order he was subject to prosecution and imprisonment and thereafter to internment.⁸ General DeWitt, evidently priding himself on his own Caucasian ancestry, viewed Caucasian alien enemies as being entitled to better treatment than our citizens of Japanese lineage.

He subjected all persons of Japanese ancestry within Military Area No. 1 and those in the A Zones in Military Areas 2 to 6, inclusive, to curfew regulations and travel restrictions. Thereby he imprisoned them in an area circumscribed by a circle of a five (5) mile radius from

⁸In *Hirabayashi v. U. S.*, 320 U. S. 81, and *Yasui v. U. S.*, 320 U. S. 115, the Supreme Court upheld the validity of a curfew on persons of Japanese ancestry as an emergency police power measure occasioning only a trifling invasion of personal liberty which the court assumed might have been justified as a military necessity. That there never had been a rational basis for the military commander having discriminated against them in applying such a measure later was revealed when General DeWitt's "Final Report" was published in 1943.

their dwelling places or places of employment. This was the initial imprisonment in a general imprisoning program. Thereunder they were deprived of the use, possession and enjoyment of specified articles of personal property as though the same were contraband and subject to appropriation and confiscation at his whim. It is notorious that the implacable general regarded them as "alien enemies" as demonstrated by his acts, repeated speeches, and his incredibly frank Final Report wherein he reveals he acted against them recklessly, maliciously and with prejudice.

Between March 24, 1942, and August 18, 1942, General DeWitt issued a total of 108 civilian exclusion orders providing for the imprisonment of 73,000 citizens and 43,000 aliens of Japanese origin. The first became effective on March 30, 1942, and the last was issued on August 18, 1942. These orders excluded all persons of Japanese ancestry from described geographical areas and ordered them into 15 stockades called "Assembly Centers" and "Reception Centers" from which they were transported and deposited in 10 prisons called War Relocation Centers. (See 7 F.R. 2581 and 7 F.R. 6703 for the first and last of these orders.) The last of these persons in the forbidden areas was removed to a War Relocation Center on October 27, 1942. *Final Report*, p. 158. It is to be recalled that the Japanese secret code had been deciphered in early 1942 and that our military and naval authorities were fully informed as to the disposition of the Japanese fleet and that our naval forces had won the Battle of Midway on June 6, 1942, and that this decisive victory removed the last threat of the enemy against our Ha-

waiian outposts. Nevertheless, General DeWitt, through his exclusion orders, continued to treat the evacuees as though they were alien enemies and continued incarcerating them in concentration camps. Few had a chance to escape imprisonment. The first such order gave the affected persons five days to leave Bainbridge Island and Military Area No. 1. Many took up residence in Military Area No. 2 only later to be picked up and be imprisoned in a concentration camp.

These civilian exclusion orders were in diametrical conflict with the provisions of Public Proclamation No. 3. The proclamation commanded the affected persons to remain within a 5 mile radius of their residences upon pain of penalty of prosecution for violation of Public Law No. 503. The civilian exclusion orders commanded them to depart from their residences and to confine themselves in Assembly Centers, from which they were transported to permanent War Relocation Centers for imprisonment for an indefinite period of time. Despite the fact that the proclamation and civilian exclusion orders required opposite acts of the affected persons and despite the fact that the Supreme Court held in *Korematsu v. U.S.*, 323 U.S. 214, that "a person cannot be convicted for doing the very thing which it is a crime to fail to do" that Court, nevertheless, held that a violation of an exclusion order was punishable under Public Law No. 503 because its provisions were not in conflict with Public Proclamation No. 4, ignoring the fact that it was in conflict with Public Proclamation No. 3. The majority decision and opinion of that Court was erroneous on the ground stated. Obviously the affected persons could not at the same time re-

main within a five mile radius of their residences and at the same time remove themselves therefrom to Assembly Centers without being guilty of violating one or the other of the orders and being rendered liable to prosecution and punishment under Public Law No. 503, now codified as Title 18 USCA, sec. 97a. These people were trapped into a choice of violating either Public Proclamation No. 3 or a civilian exclusion order and the punishment for either violation was identical. In view of the fact that the Supreme Court rendered its decision while the war still was in progress and when it was not apprised of the facts which since have come to light it is likely that Court one day may overrule the Korematsu decision.

On March 27, 1942, Public Proclamation No. 4 (7 F.R. 2601), a freezing order, commanded that commencing at midnight March 29, 1942, "all alien Japanese and persons of Japanese ancestry" within Military Area No. 1, be and they hereby are prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct." Violation of this order was made punishable under Public Law 503. This order did not supplant or cancel Public Proclamation No. 3, which still remained in full force and effect. A like order froze similarly descended persons in Military Area No. 2. (Pub. Proc. No. 6; 7 F.R. 4436.) All the affected citizens were treated as though they were alien enemies.

Under the successive civilian exclusion orders the imprisonment of these people was affected as follows: They were ordered from the whole of California (Pub. Procs. 4 and 11, 7 F.R. 2601 and 6703) and portions of Wash-

ington, Oregon and Arizona unless they were within the bounds of Assembly Centers which were under the control of the Wartime Civil Control Authority, a military agency set up by General DeWitt whereby he kept his heel upon these people. The name of the agency was made euphemistic in order to mislead the public into a belief it was a civilian agency. See also, Pub. Proc. No. 7 of June 8, 1942, 7 F.R. 4498. These orders drove them into these Assembly Centers from which they were removed under armed military escorts as though they were alien enemies and prisoners of war to War Relocation Centers managed by the WRA. It is to be noted that alien enemies were better treated.

In this fashion the alarmist General provided for the imprisonment of our Japanese population for an indefinite period of time within the prescribed military areas. He did this despite the fact that Congress on February 19th and June 18, 1942, refused to authorize their imprisonment. Only the cessation of war prevented the imprisonment from being for life for a large number of them.⁹ All the tears shed by helpless women and children and the shattered hopes, the fears and the disillusionment

⁹General DeWitt who, since the war's end, has stated that he had been concerned only in the evacuation of these people and that he had not contemplated their internment appears to have forgotten his one time anxiety to insure the incarceration of evacuees in WRA Centers not only within his military department but outside that department. (See Pub. Proc. WD-1.) His memory today is lively insofar as his own property rights are concerned for although he has expressed a wish to reside on the west coast he excludes himself from so doing because of an unfounded fear of lawsuits being instituted against him by a number of one time excluded evacuees of whose rights he once exhibited little concern. Had he excluded himself from the area in 1942 instead of these citizens he would not now be given to seeing ghosts.

of these people made little impression upon him and the Government. The utter senselessness of this removal of a people was evidenced by the fact that he emptied the hospitals of the sick, the disabled and the dying, the stretcher cases and the insane. That thousands of innocent persons were confined and that hundreds of the ill, the halt and the infirm died in these concentration camps meant little to the Government. That thousands of little children were born in those camps and were not to leave those prisons for years bothered the Government not at all. The General embarked upon his venture of setting up an irresponsible military dictatorship over this segment of our population which has been perpetuated over a number of them to this day in the altered form of an executive dictatorship. He was a little known military officer who, following the advent of war, rocketed from obscurity to national prominence. The racial discrimination program which he instituted, however, forever brands him an oppressor.

On March 30, 1942, General DeWitt granted certain German and Italian nationals exemptions from exclusion from military areas. (Pub. Proc. No. 5; 7 F.R. 3725.) On the same date he announced that an evacuation "was in prospect for practically all Japanese". (See H.R. 2124, p. 165, and press release, Wartime Civil Control Administration, March 30, 1942.) He was not specific as to whom he intended the words "all Japanese" to refer and failed to designate the exclusion areas. He had issued at that time one civilian exclusion order excluding all Japanese descended persons from Bainbridge Island, Wash. By a Japanese, however, he meant any person who had an an-

cestor who at any time had been a subject of Japan as his subsequent acts prove.

On May 7, 1942, the American Legion and the Native Sons of the Golden West filed an injunction suit in the court below seeking to disenfranchise citizens of Japanese lineage. The suit was not brought against these citizens directly but against the registrar of voters to cancel their names as electors while they were absent from San Francisco and were held in concentration camps and unable to defend their rights. The suit was cowardly under the circumstances. It served the nefarious purpose of creating a degree of dismay in our Japanese population then suffering the ravages of racial discrimination. This court dismissed the action and the dismissal was affirmed on appeal. See *Regan v. King* (CCA-9), 134 Fed. 2d 413, cert den. 319 U.S. 753.

On May 19, 1942, the General issued Civilian Restrictive Order No. 1 (8 F.R. 982), a general detention order, prohibiting them from leaving these Assembly and Relocation Centers without authority. The order was a mockery because bayonets already prevented them from leaving and kept them imprisoned. The orders were the products of usurped power and were neither directly nor indirectly approved or ratified by Congress or the President.

On June 27, 1942, he promulgated Public Proclamation No. 7 (7 F.R. 8345), which designated existing and future relocation centers within his military department as War Relocation Project Areas. It required the inmates to remain within the bounds thereof and visitors to obtain written permission from his headquarters to visit them.

By letter dated August 11, 1942, he delegated to the W.R.A. an authority to issue permits to persons who could qualify for conditional leave. The source of his authority to issue such an order is not apparent—but then, the source of his authority to institute his vast imprisoning program is not apparent either. Suffice to say, the infamous European permit system first was introduced to America by him.

On August 13, 1942, the Secretary of War issued Public Proclamation WD-1 (7 F.R. 6593) under which the relocation centers outside General DeWitt's military department were designated military areas and the departure of persons of Japanese origin there confined was forbidden without permission of the Secretary of War or the Director of the W.R.A. Consequently, the triumvirate, the General, the War Department and the W.R.A., was responsible initially for the wrongs of which we complain. The Department of Justice was a late addition to its ranks but it shares the responsibility for the pitiless persecution of this segment of the nation.

The W.R.A. officials early noted the evacuees' "anxieties and tensions", their generalized feelings of fear and insecurity", their "fears about the post-war future", their "fears about the breakdown of family authority", their "fears about food", their "fears of violence" and their "fear of the outside". See *W.R.A. Second Quarterly Report*, July 1, to Sept. 30, 1942, pages 51 to 63. A steady stream of cravenly attacks upon persons of Japanese lineage added to the fear of violence entertained by the evacuees. The Poston Incident of Nov. 14, 1942, was

among the first of the series. The evacuees grew more apprehensive of the future.

On October 29, 1942, the General removed his restrictive measures taken against Italian nationals and on December 29, 1942, lifted the curfew restrictions on German nationals. He failed, however, to remove the curfew and travel restrictions he had imposed upon American citizens of Japanese descent whom he, as an executive official, with the approval of the War Department, viewed as "alien enemies" and therefore treated as alien enemies and later also insulted in his infamous "Jap is a Jap" speech.

Under the provisions of Executive Order No. 9102 the W.R.A. adopted an extraordinary series of rules and regulations under which it exercised an absolute supervision, dominion and control over these citizen prisoners. Jointly with the military commander it established a military government over them despite the fact that the establishment of a provisional government has constitutional sanction only in conquered or invaded enemy territory. A military government over our own citizens in an area free from martial rule has been expressly repudiated and condemned in the recent martial law cases. See *Duncan v. Kahanamoku*, 327 U.S. 304, and also *Ex parte Milligan*, 4 Wall. (U.S.) 2. Rule by executive officers in areas outside an actual theatre of war where martial rule necessarily is imposed is as much forbidden by the Constitution as is military rule over civilians.

The whole evacuation-imprisonment program was a military blunder of the first magnitude. It was given

international publicity and, in consequence, declared to the world our prejudice against citizens of Oriental ancestry and gave our enemies effective propaganda material for use against us throughout the Orient. Further, it advertised to the world that we deemed ourselves to be weak militarily and led our enemies to believe we were fearful of a Japanese invasion of our shores.¹⁰

Leave clearance arbitrarily denied.

Before a confined citizen could receive permission to depart from any of these concentration camps an application had to be made to the Director of the W.R.A. for "leave clearance". No hearing was held on this application and its grant or denial depended entirely upon the whim and caprice of the director who, in passing thereon, considered secret reports of the F.B.I. and other data concerning the applicant but of which the applicant had neither notice nor knowledge. Consequently, the applicant had neither an opportunity to defend himself against unjust charges nor to explain unjust accusations. The types of leave which were made available to an applicant who

¹⁰At the time of evacuation Germany was on the offensive in Europe and in the Atlantic whereas Japan's advance eastward toward Hawaii had been stopped in the Battle of the Coral Sea on May 4-8, 1942. Japan had suffered a crushing defeat in the battle of Midway on June 2-6, 1942, which secured our Hawaiian outposts from danger of invasion and attack. Our invasion of the Solomon Islands in July-August, 1942, had thrown the enemy back and secured our lines of communication to Australia. General DeWitt, as a general officer, was fully acquainted with our progress in the Pacific and appreciated the significance of these great victories. He also was aware that none of our Japanese residents in Hawaii had been guilty of any acts of espionage or sabotage. It was incredible that, in view of these facts, he proceeded to treat our citizen and alien Japanese on the mainland as constituting a source of danger to us especially when he knew also that they were guiltless of crime.

received a leave clearance were "short term", "seasonal work" and "indefinite leave". Each of these was subject not only to restrictions but to revocation. The most favorable type was "indefinite leave" and this was made contingent upon the applicant consenting to notify the director of any change of residence and employment. It was made dependent not only upon whether an applicant had financial means or was capable of self-support but also upon whether the community to which he intended to remove was willing to tolerate his presence. These were novel prerequisites to impose upon a citizen not charged with crime. The applications for leave clearance and those for each of the three types of restrictive leave were determined without hearings and in a manner in which all the elements of due process of law were lacking. In form and substance the leave of whatever type, if granted, with nothing but a limited probation or parole under which the applicant remained in the constructive custody of the W.R.A. and was restricted in his activities and movement by General DeWitt and other military commanders. As such it was a form of punishment. See *Korematsu v. U.S.*, 319 U.S. 432. Unfortunately, however, it was a punishment inflicted upon them that was wholly undeserved.

Those who were not given leave were punished more severely for they were kept imprisoned in the concentration camps without charge of crime and without hearing of any kind. It is to be recalled also that even those who received indefinite leave were prohibited from re-entering the states-embracing military department of General DeWitt and beyond those boundaries and, consequently, from

returning to their homes and resuming normal employment. They remained "in the constructive custody of the Military Commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued." See W.R.A. Administrative Instruction No. 22, par. 9, dated July 20, 1942. Although this instruction later was superseded, on paper, the fact of the military jurisdiction and control over them still obtained. Consequently, at most the leave which might have been granted by the W.R.A. amounted to nothing more than increasing the dimensions of the applicant's prison. The grant of a "leave clearance" arbitrarily made was tantamount, however, to a declaration and finding by the W.R.A. Director that the applicant was a loyal citizen. See *Ex parte Endo*, 323 U.S. 283. It is significant that neither the Constitution nor Congress expressly authorized the President or any executive official under him to detain citizens under Executive Order No. 9102 or to establish a military or provisional government over them. Such a tyrannical government over civilians long ago was denounced in the *Milligan* case and recently was repudiated in the *Duncan* case, *supra*. Nevertheless, in practice, the military dictatorship over them largely was supplanted by the executive dictatorship of the executive agency, the W.R.A. We belong to a generation given to denunciations of "fascist" and "communist" dictatorships. The difference between the two types is so trifling that it is scarcely worth mention. We failed to recognize, however, that the brand of dictatorship the executive department set up and wielded over this minority and continues to wield over a number from their ranks is of the

same species. We saw the symptoms but failed to recognize the disease.¹¹

The Government branded citizens as alien enemies.

In March of 1942 the Government blundered into inactivating persons of Japanese ancestry serving in the armed forces in Hawaii and on the mainland although they did not so treat those who were serving in the Far Western Pacific. Those serving in Hawaii were inactivated in March, 1942, by General Delos C. Emmons, Commander of the Hawaiian Department. Disappointed by this shabby treatment, a group of these from the University of Hawaii organized themselves into the Varsity

¹¹Respectable organizations which long had enjoyed an undeserved reputation as guardians of the rights of racial minorities reacted to the ordeals of these persecuted people as groups of confused liberals usually do. They publicly approved the government's oppression and thereby forfeited their last claim to public respect. The Japanese American Citizen's League voiced no protests. (R. 243, 263.) The Amer. Civil Liberties Union of N. Y. reluctantly exhibited a limited interest in the Hirabayashi and Yasui appeals only after the Supreme Court had granted writs of certiorari. It was opposed to the prosecution of the Korematsu and Endo appeals which challenged the validity of the evacuation and detention of these people. Long after the habeas corpus proceedings and these suits in equity below had been instituted and the removal program halted and these suffering people had been liberated from internment it discovered it had missed a chance to reap publicity for itself and belatedly set about to assert it had been in favor of them from the start. It is unfortunate these organizations long had enjoyed a reputation for supporting worthy causes the while they were compromising great principles and betraying those causes.

The one group in the United States which expressed steady opposition to the persecution of these people from the inception of the evacuation-imprisonment-renunciation program to its conclusion was the independent ACLU of Northern California. It lent the weight of its moral support to their causes and assisted them where it could. See affidavits of Ernest Besig (R. 267-290) and of Ann Ray. (R. 301-317.) Aside from this organization these unfortunate and greatly wronged people have had to rely upon themselves without outside assistance.

Victory Volunteers, tendered their services to General Emmons, was accepted and detailed to the 34th Combat Engineers. This group was inactivated after 11 months of service to enlist in the Army. After being excluded from the draft approximately 10,000 volunteered to form the 442nd Combat Team which made history in Sicily and on the bloodstained beaches at Salerno. Those on the continental United States, including those within General DeWitt's military command, with few exceptions, were inactivated and the draft boards were ordered to refuse to induct boys of Japanese lineage and to refuse them as volunteers.

All the inactivated soldiers and all males of Japanese lineage who were of draft age shortly after September 12, 1942, received a draft classification of 4-C, that is to say, the U.S. Government deliberately classified these veterans and all males of Japanese lineage of draft age as "alien enemies". See *W.R.A. Semi-Annual Report*, January 1 to June 30, 1944, p. 13, and R. 235. These Nisei so stigmatized were deprived of their birth-right to defend this country. A grateful government branded them "alien enemies" for no reason except that they were of Japanese lineage. This was not only insult but was affront and never was affront more undeserved. Our military commanders in the battle areas knew our soldiers of Japanese ancestry to be reliable defenders of our security. General DeWitt, however, endeavored to lead us to believe that those who were within his military department and their families constituted an actual menace to our security. This was the three-star General who not only extinguished the lights on the Pacific Coast but also

extinguished the lamp of liberty in eight Western States, Alaska and a part of Arkansas.

In late January, 1943, the Government decided to accept volunteers of Japanese ancestry for the 442nd Combat Team and accepted them in April, 1943. It did not reinstitute the draft for boys of Japanese lineage until January 20, 1944. See *W.R.A. Semi-Annual Report*, January 1st to June 30, 1944, p. 14.

In the interim, however, General DeWitt had the effrontery to exclude from entering his military department American soldiers of Japanese pedigree who returned from the battlefields and sought to visit their families who were detained in the Tule Lake Center and other concentration camps. There were several instances where he had such soldiers arrested and ejected from his department. However, on April 19, 1943, in obedience to instructions from the War Department, he was compelled to rescind his orders and to allow them unrestricted movement within his military department. See Pub. Proc. 17. Public criticism forced this change. He also had prevented from entry into his military domain veterans of the First World War who were of Japanese origin. He left untouched, however, a dozen Nisei soldiers who were stationed at Byron Hot Springs, Calif., where they were engaged in exacting military information from enemy soldiers who were held as prisoners of war. He let them alone simply because they were under the direct jurisdiction of the War Department with which he dared not interfere. He left untouched also one Nisei immigration officer in Los Angeles who was outside his jurisdiction.

Fortunately, he had no jurisdiction over the several hundred Nisei then serving in G-2 and other branches of the armed forces on the battlefield in the Far Western Pacific where other military commanders recognized their services as being indispensable to the prosecution of successful warfare.

After the reinstitution of the draft for them the number of boys of Japanese lineage in active military service by 1944 had increased beyond the 15,000 figure. These were scattered all over the world. Approximately 3,000 finally served in G-2 in the far Western Pacific battle areas and thousands more served in those areas in other branches of the military service. The remarkable record of the 100th Infantry Battalion, formerly a unit of the National Guard of Hawaii, is well known to the nation. The extraordinary record of the 442nd Combat Team also is well known to the nation. Before the war ended approximately 30,000 soldiers of Japanese ancestry were in uniform. The casualty rate of these soldiers was especially high in Italy. Their families, however, were in our concentration camps.

In the Tule Lake Center ultimately were confined several hundred veterans who had served in 1940, 1941 and 1942 and who had been given honorable discharges in 1942 when they and all males of like lineage of draft age were excluded and arbitrarily classified as 4-C, that is to say, as "alien enemies" for no reason save and except they were of Japanese lineage. Since their release from internment a large number of renunciants from the Tule Lake Center have been drafted into military service and

a number are serving overseas. Their release during 1946-7 from an unmerited internment enabled them to respond and react as normal persons do.

The Attorney General, for some reason or other, keeps up the pretense that renunciants might be a danger to our security. He differs from General DeWitt in that he would permit a few candles of freedom to flicker unsteadily in the darkness of the times. Apparently, it is difficult for an executive officer to cut the Gordian knot of executive blunders by open admission of error. Perhaps it is feared that such action might arouse criticism from a few misinformed and misguided sources. It is apparent that political expediency supplants right and that legality is considered by a few executive officers to be of little importance.

Harassment of citizens held under duress.

On December 5, 1942, two young evacuees were shot dead and ten were wounded by military police at the Manzanar W.R.A. concentration camp. A few newspapers which value rumors higher than truth were quick to spread a false report that the incident had been provoked by disloyal internees. There was nothing sinister in the assemblage however. Its purpose was the presentation of petitions to the W.R.A. officials for a redress of grievances, a matter we have been taught was guaranteed by the 1st Amendment. See *W.R.A. Quarterly Report*, October 1 to December 31, 1942, pp. 37-38. Evidently the right to shoot interned loyal citizens arises as an incident to the power to intern them. The internees were not kept well informed as to happenings outside their prisons. Al-

though they were shut off from the rest of the world they learned what went on in the concentration camps. The troops' violence incident spread fear in the hearts and minds of all the imprisoned persons.

Question No. 28.

After some 73,000 citizens of Japanese pedigree had been incarcerated in these concentration camps and were in imminent fear of being deported to Japan, the Government, in early 1943, devised a special trap to confuse, mislead, deceive and compel them to make a false admission. These frightened unfortunates were required by the Army and the W.R.A. to fill out special questionnaires while they were detained in these prisons. It is to be borne in mind that these questionnaires were required to be filled in by groups of imprisoned citizens singled out from the whole body of citizens merely because they were of Japanese ancestry. Question No. 28 in DSS-Form 304A of the Selective Service System entitled "Statement of United States Citizen of Japanese Ancestry" required them to "forswear any form of allegiance or obedience to the Japanese Emperor", that is, it required them to renounce an allegiance to an enemy government none of them had. (The same question originally also was asked of the aliens ineligible to citizenship who, if they took such an oath thereby would have become "stateless" persons or "denizens" or "subjects" of the United States. The form later was revised so that Question 28 for the aliens required them to swear "to abide by the laws of the United States and to take no action which would in any way interfere with the war efforts of the United States".) The citizens

were required to answer Question No. 28 in its original form.

The W.R.A. Application for Leave Clearance, Form WRA-126 Rev. contained the same obnoxious Question No. 28 for citizens to answer. Never was unfairer question asked of any American citizen. We did not ask citizens of German and Italian lineage to renounce an allegiance to Hitler and Mussolini they never had. Approximately 5,000 citizens refused to answer the question at all because of this discrimination between citizens and because to make such a renunciation involved a false admission that up to that time the person taking such an oath had owed and given allegiance to the Japanese Emperor and had not given an undivided allegiance to the United States. If a citizen answered "yes" he was trapped into making a false admission of allegiance up to that time to Japan. If he answered "no" he was deemed disloyal. If he refused to answer such a false question his refusal was interpreted as a silent admission of disloyalty. Each feared punishment as a criminal if he answered yes or no or refused to answer. At the time each believed and had reason to believe the Government destined him for deportation to Japan and that whatever his answer might be it would be construed against him and result in his imprisonment and deportation. Hitler could not have dreamed of a better trap or devised a more malicious one. The evacuees were terrorized. See *W.R.A. Semi-Annual Report*, January 1 to June 30, 1943, pp. 10-15, where the W.R.A. admits the unfairness of the questionnaire. See also R. 149, 228, 316, admitting the same thing and R. 268-270, showing

protests against the questionnaire and against question No. 28 in particular.

We draw attention to the fact that this oath was asked of interned citizens who had been denied all the rights of citizenship, who were held without expectation of relief and who, to all intents and purposes, had been repudiated by our own Government. Our Government asked a trick question of these citizens of Japanese ancestry which it did not ask of other citizens. Obviously it did not dare ask white, black and yellow skinned citizens on an equal basis to admit or deny any allegiance to Japan or to any other foreign power. The reason is that we have one law but two types of application of the law, one for the popular majority and one for the unpopular minorities. The internees then became convinced that all evacuees and their alien parents were destined finally for deportation to Japan.

The cold-blooded enmity of our Government towards Japanese descended people was not confined to our own citizen and alien residents as is demonstrated by the following facts: During 1943 and 1944 some 1800 Japanese, including their Peruvian wives and children, were kidnapped in Peru as the result of a conspiracy between the United States and Peru.¹² They were transported to this

¹²The secret internment of these Peruvian-Japanese being revealed in early 1946 the State Department hastily washed its hands of the matter. J. Edgar Hoover, Director of the F.B.I., pronounced them harmless, the Justice Department disclaimed any responsibility for their plight and their internment under the Alien Enemy Act was transformed into simple detention for deportation purposes as though they had violated our immigration laws. They passed into the custody of the USI&NS. The Government then contended that inasmuch as Peru denied them re-admission to its borders that

country by our military police and were interned at Santa Fe, New Mexico, and Crystal City, Texas. The purpose of this uprooting was to obtain Japanese from foreign sources to exchange them for prisoners of war held in Japan. Some 1200 of these eventually were transported to Japan because of their despair of being repatriated to Peru or being relocated in this country. The remainder, denied access to Peru, were scheduled for removal to Japan under a claimed authority of the Alien Enemy Act.

The Tule Lake Center.

The Tule Lake Center was situated in Modoc County, California. The post-office inside that Center was called Newell. The camp was erected on an ancient lake bed which had become a tule swamp and had been drained. It was some 37 miles south of Klamath Falls, Oregon, the

they were deportable to Japan because their lack of admission credentials and their inability to speak, read or write English or Hebrew rendered their presence in the United States unlawful.

A number of them were transferred from Santa Fe to Wilmington, Cal., and two to San Francisco. Deportation being imminent two test proceedings in habeas corpus (Nos. 26139 and 26140) were brought in the District Court below on June 25, 1946, and the deportation program was brought to a forced halt. Thereafter, various government agencies, somewhat irked, chagrined and shamed consented to have the cases held in abeyance pending counsel's efforts to persuade the Peruvian government to permit their repatriation to Peru. Thereafter, a number of the families were returned to their homes in Peru but some 295 have been denied that right to this day. In the interim the remainder, pursuant to agreement, have been relocated in the United States and are gainfully employed. Those who are situated at Seabrook Farms, N.J., still are protected by the USI&NS through a theoretical form of custody which is maintained over them for their protection against exploitation in the event they seek relocation elsewhere. Under relief legislation (8 USCA, Sec. 155(c), as amended July 1, 1948, 62 Stat. 1206), which was sponsored by Thomas M. Cooley II, all of these ultimately will be granted permanent resident status in the United States.

nearest town of any size. It was at an elevation of 4105 feet and surrounded by barren mountains. High velocity winds constantly swept over the camp and in summer the dust laden air made breathing difficult and drove the inmates indoors. In winter the camp was covered with snow and the shacks in which evacuee families lived and the barracks in which unmarried persons lived were cold. The flooring of the shacks and barracks, which also were shacks, contained almost as much crevice as flooring through which the wind swept, the summer dust accumulated and the winter cold penetrated. The roofs and outside walls were covered with tar-paper. Coal-burning stoves filled the air with soot but gave off insufficient heat to warm the shacks. Coal was scarce and rationed. The internees roasted in summer and froze in winter. The W.R.A. staff and personnel were comfortably housed in well constructed homes and apartments situated in a choicer section of the Center. These were properly ventilated, heated and lighted. The Caucasian dwellings were fully equipped with bathtubs, showers, modern stoves for cooking purposes and up-to-date oil heating stoves to protect them from inclement weather. Needless to say, they were supplied with adequate quantities of fuel oil and the homes had running hot and cold water. The shacks of the internees had none of these things.

The food rationed to the internees was neither sufficient in quantity nor appetizing in quality. It was not comparable to army rations. The Caucasians employed by the W.R.A. did not want for anything that could contribute to their comfort. For their benefit the authorities maintained a canteen and a cafeteria where they obtained excellent

food at minimum prices and also tobacco tax free. A recreation club where they obtained food and services at like trifling cost and free entertainment also was provided for their convenience. They received excellent personal services from interneers hired at peon wages to wait upon them as domestics and to perform menial tasks. (R. 285-6.) The bulk of the onerous and irksome work in the administrative offices was performed by interneers at like slave labor wages. The majority of the Caucasian government employees enjoyed their sojourn in Tule in comfort and leisure. None of the interneers did however.

A high barbed wire steel fence surrounded the Center. Elevated block houses in which armed sentries were stationed faced the entrance and like watch towers were situated on the rims of the encampment, on the adjacent hill and the nearby mountains. Armed guards kept the camp under surveillance with guns trained on the camp. Sentries walked their posts carrying rifles. A detachment of military police was quartered in one corner of the Center where a contingent of armored trucks and tanks also was stationed. R. 225-6, 291-2.

There was little or nothing for a majority of the interneers to do to occupy their time and to prevent ennui and insanity except to indulge in futile pursuits, to worry and to pray. Their prayers were not answered. They had little material available to devote to handicraft purposes to divert their attention. With the exception of a few pieces of scrap material they could find neither wood nor metal to work. The few pieces of wood they found they polished and fashioned into useful household appliances and articles of adornment. They were forbidden to dig a

few inches into the soil for the small sea-shells they were wont to polish with sand and transform into such ornaments as flowers, crosses and rosaries which they colored with rouge and nail polish for lack of other materials. The administrative and police authorities finally prohibited them from digging for these shells because of a claim that the digging between the rows of shacks might render uncomfortable the driving of automobiles through the camp by the W.R.A. officials.

Prior to the time the Tule Lake area became noted chiefly for the oppression of the internees it was well known as a stopover place for the annual migration of millions of ducks, geese, gulls, pelicans and other birds. The Caucasian W.R.A. employees were amply supplied with wild ducks, geese and deer in the hunting seasons. They feasted while the internees fasted. The internees were denied a diet of these delicacies because the Caucasians did not believe in sharing their abundance with their yellow brothers and sisters. Perhaps the authorities in charge believed that if they enabled the internees to partake of this natural fare the authorities might be criticized for pampering the prisoners.

Segregation plan.

On May 25, 1943, the project directors of the W.R.A. unanimously agreed to set up a separate center for quartering aliens and their families who desired to be repatriated to Japan. On June 25, 1943, Mr. Dillon Myer, the national director of the W.R.A., recommended that the Tule Lake Center be transformed into a segregation center. See W.R.A. *Semi-Annual Report*, January 1 to

June 30, 1943, pp. 49, 50. At Denver, on July 27, 1943, Mr. Myer conferred with the project directors and outlined the segregation plans. See W.R.A. *Semi-Annual Report*, July 1 to December 31, 1943, p. 99. Residents of the Tule Lake Center protested against opening the center to persons who wished to be repatriated but the protest was ignored. In August, 1943, the W.R.A. conducted a survey in the center and each internee was asked whether he desired to remain in the center or to be removed to Japan or to be transferred to another W.R.A. camp. Approximately 10,000 preferred to remain in the center and were permitted to remain. Approximately 5,000 residents, citizens and aliens, applied for transfer to other camps and were transferred. R. 227, 279, 335.

Denial of leave clearance in other centers caused transfer to the Tule Lake Center.

The prerequisite for admission to the Tule Lake Center from other war relocation centers of persons who did not wish to be sent to Japan was a denial of leave clearance in those centers. A transfer to this intended segregation center did not mean that the transferee was a disloyal person or hostile to the United States. This was the center where aliens desiring repatriation originally were intended to be segregated from citizens and aliens who wished to remain in the United States. It was a segregation center, however, where no segregation took place. R. 227, 279. A denial of leave clearance in other centers and in this center depended entirely upon the whim and caprice of the director of the W.R.A. and, consequently, upon the whim and caprice of his agents. Leave clear-

ances were denied the following classes of persons, to wit, (1) those who applied for repatriation to Japan, (2) those whose answers to Question No. 28 were deemed to be unsatisfactory, (3) those who had stated their loyalty to or sympathy with the United States but of whom the director had doubts, (4) those whom the director arbitrarily declared not to be eligible for leave and (5) those who were eligible for leave but wished to live in the Tule Lake Center in order to be with members of their immediate families." See W.R.A. pamphlet entitled "Segregation of Persons of Japanese Ancestry in Relocation Centers", Wash., D. C., August, 1943.

A denial of leave clearance could be based upon rumor, hearsay and suspicion or upon no reason whatever except caprice. It could be based upon arbitrary factors such as the fact that a person was a kibeï, or had investments in Japanese securities or his next of kin in Japan. It could be based upon arbitrary factors of which the transferee was kept ignorant and upon factors which would shock the conscience of sober-minded persons. The prospective transferee, unaware of the reason for the denial of his application for leave clearance and of the nature of any accusation against him, if any existed, and in ignorance of the contents of the dossier maintained by the director and without hearing of any kind or chance to defend himself against rumors and unjust charges, was ordered transferred to the Tule Lake Center and was forcibly taken there. See *W.R.A. Manual*, Chaps. 110 and 60.10. By regulations established October 15, 1943, a person detained in this center was permitted to re-apply for

leave clearance. See *W.R.A. Handbook*, Secs. 60.11.1 to 60.11.11, inclusive.¹³ Refusals of leave still depended upon whim and caprice, consequently, grants of leave continued to be subject to the same defects and vices. Unfortunately, however, the W.R.A. in October, 1943, closed out its relocation office in the inner section of the center where the internees were confined and did not reopen it until June, 1945. R. 229-230, 255. Because of the difficulty of obtaining special permits to leave the inner area and enter the administrative section of the center to inquire about the possibility of leave clearance and the danger from pressure group members to which such a move exposed a person rendered it practically impossible for an internee even to apply for leave clearance. R. 229, 255, 256, 298.

When the 5,000 willing transferees had departed approximately 8,000 persons from other camps were brought into the Tule Lake Center. About 5,000 of these were aliens who, by reason of their long imprisonment and impoverishment, had expressed a desire to be returned to Japan on exchange ships and who, therefore, were deemed to be loyal to Japan. R. 227. Many of them were parents who desired their children to accompany them to

¹³The drafters of the W.R.A. Manual and Handbook sought to outdo our Founding Fathers in establishing a government. Unlike them, however, in writing the arbitrary organic rules and regulations by which they rode roughshod over the internees they forgot to add a Bill of Rights. Their manual and handbook, as the handiwork of drafters unfamiliar with democratic principles, is nothing but a Bill of Wrongs. When the truth finally is published concerning the W.R.A. and its mismanagement of these concentration camps and the cruel dominion it exercised over the internees it will be found that many parasitic members of the W.R.A. bore a hatred of the internees until these centers were about to be closed and the hosts to make their departure.

Japan. The remaining 3,000 were citizens to whom the W.R.A. arbitrarily had denied "leave clearance".

Being sent to the Tule Lake Center from other camps had nothing whatever to do with disloyalty on their part. These aliens were not hostile to the United States and did not menace our security. They then had been imprisoned for about two years and were impoverished as a result and when invited by the Government to repatriate to Japan to begin life anew they accepted the offer. They were disillusioned by their imprisonment but they were not hostile. A number of the citizen family members accompanied their alien parents to the center to avoid family separation. The majority of the aliens and citizens who were transferred to the center from other camps were transferred simply because they arbitrarily had been denied leave clearance by the W.R.A.

The 10,000 residents who remained in the center by preference were citizens and aliens. Among these were aliens who desired repatriation. The great majority of these, however, also were citizens and aliens and their families who had been denied leave clearance and who, although fearful of deportation, still hoped and wished to remain in the United States. R. 227-8, 336. It makes little difference that some people, nursed on jingoist literature, may have considered them disloyal. They were neither disloyal nor hostile. Disloyalty and hostility are not criminal because they are mere states of mind. Our laws are not supposed to inflict punishment for mere states of mind. There are laws, however, against disloyal utterances and hostile acts and such overt things are

punishable. But it would be false to accuse these people of disloyalty, hostility or overt acts against us. While they did not menace us there is no doubt that our Government was hostile to them. Moreover, it was unfair and dishonest in dealing with them. It mistreated them, wrecked their fortunes and ruined their lives. In treating these citizens and resident aliens as though they were dangerous enemies the Government stigmatized them as such in the public eye and they were compelled to suffer from public hatred.

There were many reasons why residents of the center preferred to remain there rather than be transferred to other camps in the mid-west. They were established in the center with their alien parents and family members from whom they did not wish forever to be separated. Many preferred the climate of California to that of other states. Many feared that if they were removed from California they would never be able to return. Many good and sufficient reasons existed for them to express a preference for remaining in the center. R. 151, 279, 336.

The abandonment of segregation plans and adoption of Government's policy of preparing internees for life in Japan was productive of violence and fear.

The so-called segregation plan the W.R.A. had decided on July 27, 1943, to put into effect was never completed. It was abandoned on October 15, 1943, because of the complex administrative, transportation and other problems involved in such an undertaking. R. 227.

The individuals desiring to be repatriated to Japan were desirous of becoming as Japanese as possible and

had been led by the Government to believe and expect the center would be one where only intended repatriates would be harbored. The residents who already had been established there and remained there resented the presence of the intended repatriates and regarded them as intruders. They resented the repatriates' desire to become foreigners, their efforts to adopt Japanese customs, manners and practices, their unwillingness to use the English language and their exclusive use of the Japanese tongue in the center which housed thousands of American citizens and resident aliens who hoped to remain here. Each group protested the presence of the other to the W.R.A. in vain. R. 227, 228, 230. Those hoping to stay in the United States asked the W.R.A. to segregate the two groups in the center. The W.R.A. toyed with the suggestion and contemplated a re-segregation by fencing them separately and wound up doing nothing. R. 352-359. It was a blunder of the first order. The motives of the W.R.A. officials in refusing to re-segregate the groups were peculiar and unjustifiable. They refused because they believed re-segregation might indicate a weakness on the part of the Government in yielding to the demands of the aliens and because it also might be regarded as a confession by the camp authorities of an inability to maintain order and discipline in the center. See R. 279-280. As the result the intended repatriates were quartered indiscriminately among those desiring to remain here. It was the failure of the W.R.A. to carry out the segregation plan that enabled the alien pressure groups to organize in that center and to embark upon their campaign of propaganda, intimidation and violence that gave impetus to the renunciations.

The policy of the W.R.A. that gave rise to the internal coercion which contributed to the renunciations.

Recognizing that the center then contained a large number of aliens who desired to be repatriated to Japan and to take their children with them the W.R.A. adopted the policy of assisting in preparing them for their future existence in Japan. The authorities in charge deemed it essential that they be taught and become proficient in the Japanese language, and become acquainted with Japanese culture and customs and generally to be educated as if they were being educated in Japan. R. 231, 241-2. It was the general lack of proficiency in Japanese that later accounted for the prohibition against the internees' use of English which was enforced by the pressure groups which soon rose from the ranks of the intended repatriates. To this end the W.R.A. inaugurated and fostered the Japanese language schools which soon assumed a dominant position in the center and carried on a systematic campaign to indoctrinate American children with a foreign ideology. It permitted the teaching of physical education courses patterned after schools in Japan. It was this that led to the mass exercises, marching exhibitions and other activities of the pressure group which arose from the midst of the intended repatriates and invoked the internal terror in the camp that contributed to the flood of renunciation applications. R. 250, 252, 259, 296-7. These practices were tolerated in the center because the official view was that all the interned citizens and aliens eventually would be sent to Japan and that, in consequence, it made little difference what happened to them. These things created a genuine fear in the internees that all of them would be deported and that open opposition to the

pressure groups would endanger their own lives and the safety of their families when they were deported.

Troop violence intimidated internees.

On November 1, 1943, the authorities held a meeting in front of the administrative building. All interested internees were invited to attend and to discuss camp problems with Mr. Best. At the time a political struggle was being waged between two factions of the W.R.A. management. One, under Mr. Best, sought to establish an appointive system for the representation of the internees. The other, under Mr. Black, the assistant project director, sought to establish an elective system for their representation. Each had his respective sympathizers among the W.R.A. personnel and the internees. The particular question for discussion and decision was the type of representation to be determined upon for the internal government of the inner area. The assembly was authorized. That right is one for which the 1st Amendment was added to the Constitution. The meeting had official sanction. Mr. Best and various spokesmen for the internees spoke. No physical pressure was put upon anyone. That building was not surrounded by internees. As an excuse for what later was to occur some of the Caucasian members of the W.R.A. have tried to convince themselves that a few of them received an impression that the crowd was imprisoning the administrative officials within the building. If any member of that staff entertained any such impression he was an alarmist and subject to delusions. Neither Mr. Myer nor Mr. Best received any such impression. That building was an extensive U-shaped eight-

sided building containing six doorways. An adequate number of armed internal security police were inside and outside. No disorder occurred and none was threatened. No threats of violence were made. Having learned that Mr. Myer, the director of the W.R.A., had arrived in camp upon an inspection tour members of the crowd called out requesting that he address them and hear their grievances and suggestions concerning camp conditions. Suffice to say Mr. Myer welcomed the opportunity and addressed them from the open porch fronting the building, heard their suggestions and took on the spot measures to correct many of the conditions of which internees complained. R. 154, 339.

Unfortunately, while that meeting was being held several internees while walking through the corridors of the hospital building situated some distance away were accosted by a staff physician. A fight ensued and he was beaten. From all reports he was the aggressor. It was the general opinion that he received his just desserts.

On November 4, 1943, eighteen evacuees in the center were escorted forcibly by members of the internal security police to the police squad room where they were severely beaten with clubs. A number of them were beaten into insensibility and all were hospitalized. R. 231, 232, 393. See W.R.A. *Semi-Annual Report*, July to December 31, 1943. See American Civil Liberties Union "*Union News*" of August, 1944. The authorities in charge ever since have been reluctant to divulge the result of their investigation into the cause of this outrage. The W.R.A. suppressed news of the violence. The residents of the center learned of the matter and became panic stricken because

of the lack of protection accorded them by the federal authorities in charge.

On the night of November 4, 1943, a few youths trespassed into the motor equipment area where they were allowed during the day but forbidden at night. The gates were still open. Undoubtedly they were looking for scrap material to use in their shacks. Any material that could be found was put to some mechanical or artistic use by the internees. The camp was dark as pitch at night except for the little light shed by distantly spaced electric lights. All the houses were set up in long rows and each resembled the other. They could be distinguished from one another only by persons long familiar with a given area. It was difficult enough to distinguish one habitation from another during daylight and almost impossible to do so at night. There was, of course, a wide difference between the shacks of the internees and the dwellings of the Caucasian personnel. If the youths approached Mr. Best's house they evidently were not aware of it. An unidentified alarmist notified Mr. Best that he was on the verge of being attacked by lurkers. Reflecting in a measure the fear felt in the camp, Mr. Best grew alarmed and called in the troops. This is the "incident" of which the W.R.A.'ers later were accustomed to speak in whispers. Mr. Best saw neither hide nor hair of any would-be attackers. Apparently no one else did either except the unidentified alarmist. Members of the W.R.A. were in the habit of seeing spectres of their own creation. It was a mental defense mechanism by which they convinced themselves the camp was alive with danger. The danger was to the internees, however, and not to the W.R.A. employees. R. 340, 393.

The troops marched and the tanks rolled into the inner area. A forced search was conducted from shack to shack. Lawless martial rule was imposed but the censors carefully deleted the words "martial law" from the internees' correspondence because those disagreeable but accurate words offended the official censor's sense of propriety. See "*The Spoilage*", 147, 160. The internees were driven indoors by bayonets and all during the night and for approximately twelve days and nights following the troops conducted a house to house search for contraband and at the point of bayonets forcibly searched every man, woman and child in the area. R. 231-2, 340-2. It was sport to the soldiers, a Roman holiday for the Caucasian W.R.A. personnel and terror to the internees. The press was in an uproar of delight and featured lurid front page stories of a terrible riot at Tule. Troop violence, however, is not called a riot—it always is justified as a necessary military measure taken to suppress violence. Institutionalized W.R.A. employees kept the rumor factory busy. A riot that never occurred was magnified by exaggeration of lies into a rebellion. The public was shocked by the stories but the internees were horror stricken by what they witnessed and suffered. The forcible 12-day search resulted in the lawless seizure of scores of innocent internees who were thrown by the troops into the stockade, an "isolation area", a prison within a prison, where many were forced to languish for months without charges being filed against them and without hearings being accorded them. R. 342. The violence of the troops was real, however, and the dread of troop violence was communicated to every internee. R. 232.

The Army authorities and Mr. Best had asked the internees to meet on the morning of November 5, 1943, to elect block representatives to seek an adjustment of their grievances. The group approached the administrative section of the camp. The troops dispersed them with tear gas bombs (R. 232, 340) and thereafter picked up the elected representatives and cast them into the stockade. Their subsequently elected successors likewise were jailed until the internees refused to elect additional representatives to meet the same experience. The procedure was diversion for the troops, amusement for the W.R.A. and terrifying for the internees. In such a manner the democratic method of the internees' representation in their internal government was smashed.

The W.R.A. established an elaborate police system composed of Caucasian policemen. R. 282-3. The members evidently had been picked because of their avowed contempt of Japanese generally and for their capacity for brutality. They constituted a veritable gestapo. They appeared to have been recruited from the ranks of savages. They were given uniforms, guns and clubs and so they proceeded to use them. They filled the squad room with enormous quantities of hand grenades, tear gas bombs and ammunition and had a constant itch to use these. They stalked about the Center during the day and prowled at night in groups of twos and threes, making a display of force and intimidating internees whom they regarded as contemptible Japs. They were given to striding into the inner area and exhibiting their hostility. Without warning they were wont to descend upon the internees'

homes, carry on forcible searches and seizures in the houses and barracks, herd men, women and children into corners and search them. R. 233, 234, 282-285. They treated the internees as though they were dogs or chattels. The internees dreaded these lawless police more than they feared the lawless troops.

The Army carried out sporadic raids upon the quarters of residents and conducted forcible searches and seizures of individuals until the troops were relieved from duty at the Center about March 1, 1944. Thereafter, however, the internal security police took over and conducted hundreds of forcible searches and seizures for months until the renunciation program had been concluded. Hundreds of internees were seized during all hours of the day and night and were thrown into "The Stockade", the special prison in the center originally opened by the troops and thereafter maintained by the internal security police. These policemen looked upon the seizures as a species of amusement. Hundreds of internees were lodged in the stockade and there languished for periods ranging from one day to eleven months without hearings being given them on the reason for their enforced incarceration. See R. 234, 272-278, 283-284, and The Spoilage, 283-303. Suffice to say that every person confined to that camp was kept in a constant state of worry and fright that he or she might be seized in the day or night and be thrown into the stockade and there be held incommunicado from family and friends. These practices terrorized the internees. None of them was free from this constant threat of violence and mistreatment and none was and none could have

been free from the fear these raids engendered in their minds.

The oppression and violence by the internal security police officers steadily grew worse until conditions alarmed Mr. Myer. He removed the chief of police and in August, 1945, sent J. H. DeWitt as his successor. This new chief reorganized the police force, got rid of its menacing members and engaged new officers. He made it his personal practice to walk about the inner area or colony at all hours of the day and night alone and unarmed. His intelligent appraisal of conditions, the example he set by his practice and his sympathetic attitude towards the internees was appreciated and did much to allay their fears. Suffice to say that he is not related to the General who bears the same name.

The Japanese language schools at Tule.

When the aliens desiring repatriation to Japan had been brought into the Tule Lake Center and the segregation plan abandoned on October 15, 1943, the situation was unpleasant to those aliens who wished to be separated from those who wished to remain in this country and disagreeable to the latter. The aliens desiring repatriation wished to become as Japanese as possible. The aliens who desired to remain here wished to become as Americanized as possible and the citizens wished to remain American. Protests to the W.R.A. from both groups were wasted on deaf ears. R. 226, 227. The W.R.A. was insensible to the problems of mere Japanese and indifferent to their sufferings. R. 279-280, 282.

Nevertheless, the W.R.A. sponsored Japanese language schools in the Center and made it compulsory for all children of school age to attend school. R. 241, 242, 249. There was only one American high school and one grammar school maintained in the Center where 18,000 internees were crowded into a camp intended to house 15,000 persons. Attendance at the American schools was optional. The Japanese language was not taught in the American schools. Consequently, the W.R.A. fostered and initiated the opening and maintained the Japanese language schools but thereafter did not exercise active supervision over them. Its primary purpose in fostering these schools was to enable those who wished to repatriate to Japan to have their children educated in the Japanese language, customs and culture in preparation for their intended future life in Japan. R. 162, 241, 242, 249, 281-2. The W.R.A. superintendent of schools protested the existence of these schools and suggested that the Japanese language be taught in the American schools and the schools be scrutinized closely by the authorities but his suggestion went unheeded. Other protests were made and were ignored. R. 281-2.

Unfortunately, there were far too many children to attend the one American grammar and the one American high school. Consequently, a majority of the parents found themselves in a position where they had to send their children to the W.R.A. fostered Japanese language schools. The W.R.A. did not appoint the teaching staffs of these radical schools and did not subject them to supervision. Inasmuch as they were designed to prepare chil-

dren for life in Japan the American children who attended and had no intention of going to Japan were subjected to systematic indoctrination of Japanese sentiments by the alien teachers. The culture which the pupils were supposed to glean from these schools turned out to be the "kultur" characteristic of prewar Germany and Japan. In this manner the alien groups, with the full knowledge, consent and assistance of the authorities in charge of the Center, came to dominate and control the educational system which prevailed in the Center. Alongside of these Government sponsored Japanese language schools there developed an even more noxious type of language school which was controlled by aliens who desired to be repatriated to Japan. R. 257, 293-295. Thus it came to pass that the Government, through the medium of allowing the language schools to operate actually tried to make the children anti-American by permitting them to be subjected to the indoctrination of enemy ideologies. R. 241-242, 257, 281-282, 293-295, 250-253. The fact that these schools were fostered and maintained by the W.R.A. led the internees to believe that it was the policy of the Government to allow this indoctrination because it intended to deport all of the internees to Japan and that, through the medium of these schools, the children would be prepared to take up the reins of their lives there when they were deported along with their parents.

The rise of the pressure groups.

When the transfers between the centers were halted and the segregation plan was abandoned on October 15, 1943, the W.R.A. closed out the "relocation office" in the

inner area of the Center where the internees were confined. That office was not reopened until sometime in June, 1945. See R. 229, 255. The closing of that office was a serious blunder. It seemed to confirm the internees' belief and intensified their fear that they would not be permitted to relocate in this country and that the Government intended their indefinite detention for the duration of the war unless they were deported sooner and, in any event, their final removal to Japan. By reason of the terror that developed in the inner area internees did not dare apply for permits to enter into the administrative area to make inquiry concerning the privilege of obtaining leave clearance for fear they would be considered to be informers and be punished by the pressure groups operating in the inner area. R. 229, 255-256.

Pressure groups of aliens commenced to form in the Center immediately after they had been dumped into the Center from other camps. The language schools came under their control. The purpose of these groups was to gain control of the internees and to force all the aliens to apply for repatriation and to compel the alien parents of American children to apply to take their children to Japan. As they gained strength among the aliens they sought to persuade and then to intimidate and coerce citizens to do likewise. Sporadic acts of violence against aliens and citizens who opposed them flared up repeatedly. A few examples of the reported acts of violence committed by the gangs against those who opposed their movement or who were deemed to be "informers", called "inu" in Japanese, which means "dogs", are as follows: On June 12, 1944, Tasaku Hitomi was beaten by assail-

ants, lost his sight for some time and suffered a brain concussion (R. 349); on June 13th Minekichi Shimokon, chief of the colonial police, was threatened and in fear resigned and was transferred from the camp; on June 14th Mr. Moritome was assaulted and suffered a fractured skull; on June 15th Henry Shiohama was threatened with violence; on June 16th Mr. Kurihara was severely beaten and on July 1st Aizo Takahashi was beaten. See also, *The Spoilage*, 264-271.

Thereafter the number of assaults increased in tempo. These acts of violence instilled a deep fear in all the internees. The more powerful the alien pressure groups became the more open their activities became. It grew to be dangerous for anyone to speak against these groups or openly to oppose them. The whole camp was caught up in a grip of fear that never let up but increased in intensity until the renunciation program was completed in July, 1945, and thereafter until the leaders and active members had been removed to Japan.

Shooting of Okamoto and murder of Hitomi increased internees' fears.

On May 16, 1944, James Okamoto, a citizen internee and driver of a W.R.A. construction truck, stopped his truck carrying a construction crew and a load of plaster-board at the entrance gate, produced his badge and credentials at the post and was shot to death by an M.P. sentry. The responsibility for the unprovoked killing rested on the Army. The W.R.A. authorities complained to the Colonel in charge of the troops. Secretary of the Interior, Harold L. Ickes, head of the W.R.A., appalled by this incident, denounced the shooting. The Army de-

prived its sentries of rifles and substituted revolvers. An Army board exonerated the young soldier but transferred him from the Center. This killing of this innocent boy spread terror through the camp and the internees lived in constant fear of additional acts of troop violence. See, R. 232-233, 292, and The Spoilage, 249-261.

On July 2, 1944, Yaozo Hitomi, an alien internee who had the management of the canteen in the Center, was stabbed to death at night in front of his brother's house. R. 233, 292, 328. Witnesses heard the assailant and his companions running from the scene of the crime. Although the killer was not apprehended it was the belief of all the internees that the killer was a member of one of the pressure groups performing a mission for it. The fact that a murderer was loose in the crowded camp added to the terror in which the internees lived. The W.R.A. was unable to track down the murderer. So great was the fear in which the internees held the leaders of the pressure groups that only a few were willing to testify as to the facts surrounding the case and these were able to shed no light on the matter. R. 233, 293, 349, The Spoilage, 271.

THE RENUNCIATION STATUTE.

Title 8 USCA, Sec. 801 (i), enacted as a special war-time measure by the Act of July 1, 1944 (58 Stat. 677), amending Sec. 401 (i) of the Nationality Act of 1940, which was rendered inoperative by the Joint Resolution of Congress of July 25, 1947, 61 Stat. 454, reads as follows:

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense;”

Passage of this statute was obtained by the Department of Justice for the special purpose of procuring renunciations of native-born Americans of Japanese lineage. It was a special species of discriminatory class legislation. It was applied to them as the legal implementation of the government created hysteria and terror which induced the renunciations. It was originally intended by the Department to be used as and was used as an instrument to induce the few leaders of the pressure groups to renounce so that they then could be removed to Japan through the medium of exchanging them for prisoners of war. See Mr. Burling's affidavit, R. 157-161, setting forth the legislative purposes for which its passage was procured and the limited application to which the statute was intended to be put. Unfortunately, it was the device which accounted for all the renunciations and it is to be noted that the statute was applied only to persons of Japanese ancestry to the exclusion of citizens of other ancestry. That the statute was framed to procure renunciations solely from citizens of Japanese pedigree and that it was applied only to such a discriminatory

purpose is set forth in Mr. Burling's affidavit. R. 157-161, 275. As such it is unconstitutional as applied. See *Yick Wo v. Hopkins*, 118 U.S. 356; *Ah Sin v. Whitman*, 198 U.S. 500, 507-8; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528; *Truax v. Raich*, 239 U.S. 33; see also, *Sims v. Rives* (CCA-DC), 84 Fed. (2d) 871, cert. den. 298 U.S. 682, and *U.S. v. Yount* (DC-Pa.), 267 Fed. 861, holding that equality is guaranteed by the due process clause of the 5th Amendment.

Reign of terror by alien leaders.

In the middle of August, 1944, the aliens who had applied for segregation and were scheduled for repatriation to Japan and who belonged to the active resegregationist groups (R. 331, 345-349) organized an "innocents" organization to further those purposes. R. 258. The new organization was called the Sokuku Kenkyu Seinen Dan. It later divided into two sections, one composed of men being called the Sokuji Kikoku Hoshi Dan and one of boys being called the Hokoku Seinen Dan. R. 331, 351. These two ultimately became known by the abbreviated names of the Hoshi Dan and the Seinen Dan. A similar "innocents" organization for women and girls was set up and called the Joshi Dan. The specific aims of the alien leaders of these groups were to persuade citizens they had been deprived of citizenship and that, in consequence, they should make formal renunciations of their citizenship and seek to be transported to Japan and also to compel all aliens to request repatriation rather than stay in permanent or indefinite internment in the United States. R. 231, 258, 265, 392, and The Spoilage, Ch. XII, 303, 322.

The membership of the three organizations, however, was made up of innocent persons who feared and believed they and their families were to be transported to Japan. To be prepared for life upon their arrival there they commenced to indulge in calisthenics and marching practices characteristic of schools in Japan. R. 351. Likewise the membership set about to attend the Japanese language schools maintained in the Center so as to learn the Japanese language, the customs and ways of life of the Japanese simply in preparation for their expected life there upon deportation.

To accomplish their purposes the alien leaders of these organizations engaged alien thugs skilled in judo and kendo to canvass and persuade, by word and deed, all the citizens to renounce citizenship and then to apply to be sent to Japan and, by like methods, to compel the aliens who had not sought repatriation to demand to be repatriated. R. 258, 260. The purpose of the leaders was evident. They sought in this manner to gain prestige when they themselves arrived in Japan. Under their leadership the number of acts of violence against those who opposed their movement increased. On October 15, 1944, Morihiko Tokunaga and two companions were beaten by gangs armed with clubs and on October 30th Toshikazu Terasawa was knifed for speaking against the segregationists. The internal reign of terror grew worse and the internees lived in daily fear of their lives.

Thereafter, a series of assaults were made on citizens by the thug agents of the leaders of these pressure organizations. These acts of violence were committed in the inner area. The internees feared to report many of these

to the authorities because of the risk of danger from the gangs. The camp had little confidence either in the desire or the ability of the authorities to protect them from the rule of terror prevailing there. An authority that had refused to segregate those desiring repatriation from those desiring to remain in the United States, that had fostered the Japanese language schools and had authorized indulgence in mass calisthenics and groups to parade and drill and aliens to carry on their systematic propaganda campaign and persistent intimidation of the internees was not an authority in which terror stricken internees could repose much confidence. The internees were subject to the double pressure of oppression from the leaders of the pressure groups and the internal security police force. The camp authorities were not only apathetic to their plight but actually were disinterested because, after all, the internees were nothing but Japs. The official view and attitude of the authorities there was that all the internees eventually were to be sent to Japan and that, in consequence, it made little difference what happened to them. R. 281-2.

The Department of Justice solicits renunciations from pressure group leaders.

Thereafter, on October 6, 1944, Attorney General Francis Biddle set up Secs. 316.1 to 316.9, inclusive, of Title 8 of his *Nationality Regulations* providing the procedure for renunciations of nationality authorized by the renunciation statute, Title 8 USCA, sec. 801 (i).

Mr. Burling became acutely aware of the activities of the leaders of the pressure groups on December 5, 1944. R. 167. He watched them in operation. He observed the blowing

of the bugles at 6:00 A.M., gymnastic exercises, drilling, alien patriotic observances, uniforms, emblems and insignia. He talked with the leaders and learned their purposes. The activities of these organizations were entirely open. The officers of these organizations in government buildings had been duly assigned to them by the W.R.A. authorities. R. 249, 257, 293. He specially solicited the renunciations of certain of the leaders he contacted and each of those approached renounced at this invitation. He then obtained the approval of the Attorney General thereto. R. 169.

Cancellation of mass exclusion orders.

On December 19, 1944, General Pratt, successor to the command of the Western Defense Command, promulgated Public Proclamation No. 21 (10 F.R. 53), effective January 2, 1945, cancelling the 108 mass civilian exclusion orders which previously had been issued by General DeWitt. This was an executive finding and judgment that none of the detained persons were deemed dangerous except those who later were given individual exclusion orders. Mr. Burling expressed the opinion in his affidavit (R. 197) that the lifting of the ban did not constitute a finding of non-dangerousness. But the sequence of the Army's proceedings show him to be in error. The lifting of the ban was an unconditional release to the girls and women. The Army took the view that they could be classified as safe without further investigation. As to the males, individual hearings before army boards were ordered. As the result of these hearings a great many males were released from exclusion from forbidden areas. Others received individual exclusion orders. See, *The Spoilage*,

pp. 334, 336-7. These rulings clearly constituted executive findings that some males were and some were not deemed dangerous at that time. Still later even these individual exclusion orders were cancelled, evidently a finding that the war had faded so far into the background that none of the individuals any longer could be deemed dangerous.

What the Government did to stop the terror reigning in Tule.

The terror that had been reigning in Tule was kept secret from the public and officialdom by the camp authorities. The W.R.A. officials were initially responsible for the rise and development of the pressure groups. They observed the program of active terrorism in actual operation. They were aware of the organizations' efforts to infect the citizens with the virus of their disloyalty yet did nothing about it. The W.R.A. gave the resegregationist groups office space from which they conducted their nefarious campaigns. R. 352. They left these helpless citizens to be exposed to an inoculation of pro-Japanese sentiment. They were aware of the organizations' efforts first to induce and next to compel all the citizens to renounce. They watched the rise of the terror and stood idly by and did absolutely nothing to protect the citizens from it. R. 238, 239, 243-247, 261-262.

The first outside government observer to notice the deplorable conditions at Tule was John Burling of the Department of Justice. He had been instructed to visit Tule because his department had been besieged with requests for renunciation applications. Obviously, he was not sent on a mission to satisfy a mere curiosity or suspicion on the part of the Department that the requests arose from

coercion. He knew, as did his Department, that the smoke from Tule conclusively indicated the fire of terror there raging that had caused the requests. The W.R.A. was in charge of that Center and not the Department of Justice. Consequently, it was knowledge that the W.R.A. had been derelict in its duty to the confined citizens that induced the Department of Justice to send its agent to the Center.

Mr. Burling arrived at Tule on December 5, 1944. R. 165. On his own initiative he questioned some 62 internees, none of whom informed him that coercion had induced their requests for renunciation applications. R. 166. What he omits to point out is that he could not expect applicants then held in terror to volunteer they were under coercion in so doing.

Odd practices at Tule.

The internees were not kept well informed as to current happenings in the outside world. The outer world was terra incognita to them but they did know what went on in the Center. Their isolation led to much speculation and worry as to what the future held in store for them—what the Government intended to do with them. This gave rise to doubt, uncertainty, worry and then to mental confusion, fear, despair and finally, under the existing circumstances, outright terror. The rumor mill was rife. Staff members of the W.R.A. became interested in the psychological reactions of the inmates of this governmental institution. Experiments in rumors were conducted in the Center because some of them had nothing must else to do except make light sport of the internees' misfortune. The anthropologist on the staff delved into psychological

research. R. 307. The internees were considered to be guinea-pigs. These were odd practices to indulge in but, apparently, the Caucasian overlords, having become somewhat institutionalized themselves, reflected in a slight measure the abnormal mental conditions of the internees herded on the other side of the fence.

The administrative authorities set up a spy system through the medium of the internal "colonial police" force which it recruited from the ranks of the evacuees. This okrana supplemented the Caucasian gestapo. The internees dared not complain of their mistreatment because a complaint endangered their security. The pressure gangs were in full swing. The constant threat of the troops, the Caucasian security police, the internal colonial police and the pressure groups with their apparatus of oppression was too much for the camp to withstand. Sanity was completely lost. Mass hysteria resulted. Panic prevailed. It was into a concentration camp whose terrorized inhabitants were suffering under the most terrible living conditions imaginable that agents of the Department of Justice stepped to take renunciations.

THE RENUNCIATION HEARINGS.

After setting up the machinery in his Department for conducting renunciation hearings Attorney General Francis Biddle sent his examining agents to the Tule Lake Center in January, 1945, for the purpose of accepting renunciations. Advance announcements of their expected arrival and the purpose of their visit were heralded in the

Newell-Star, the official publication of that Center, extending invitations to the internees to renounce. R. 179-180. The agents were John Burling, Charles M. Rothstein, Miss Ollie Collins, Joseph J. Shevlin and Miss Lillian M. Scott. R. 171.

Shortly thereafter the renunciation hearings were conducted in the camp in the very midst of the turmoil and terror. The detention in which the citizens were held was duress in itself. These pseudo-hearings were held behind closed doors by agents of the government which was oppressing them. They appeared singly before the examiners. They were deprived of the benefit of counsel, friends and witnesses. See R. 176-177; and pars. 3 at R. 214, 217 and 220. The examinations proceeded apace, the examiners being aware of the conditions but recklessly ignoring the fact that the hearings of fear-crazed citizens, under the circumstances, was duress in itself. None of the citizens was informed of the irrevocability of an act of renunciation or apprised of the legal consequences of the act. They assumed it was revocable. R. 177-178, 191. The examiners were aware from their actions and words that they were in a deranged mental state and that it was impossible to conduct a "frank and free examination of the renunciant's state of mind". R. 184-185.

Mr. Burling's oral instructions to the examining agents were to make "an effort to detect coercion and to make sure that the legal effect of the act was clear". He also instructed them, so he states, to tell each renunciant that if he did sign "he would forever cease to be an American citizen or to be entitled to any of the rights of citizens and that he would in all probability be returned to

Japan at the close of the war''. R. 177-178. However, it is to be noted that his affidavit does not recite that any such thing was told to a single citizen and that none of the affidavits of the examining officers makes any such recital. The affidavits of those officers contain a mere recitation that "Each petitioner was advised fully of the consequences of his proposed renunciation and advised that it was not necessary to renounce in order to be repatriated'', that is, to be deported to Japan. Not one person was informed that renunciation was irrevocable or that it would or might result in removal to Japan.

The examiners did not first ascertain whether the renunciants were in their right minds at the time of the hearings. They knew better. None of the confined citizens was informed or apprised of the consequences of renunciation, that it irrevocably deprived them of citizenship and all citizenship rights and authorized their detention converted into internment and final removal to Japan. Even a common criminal entering a plea of guilt to a charged crime where the punishment is a loss of civil rights is entitled first to receive such an instruction from a judge if the basic requirements of due process of law are to be satisfied. *De Meerleer v. Michigan*, 329 U.S. 663. On renunciation the requirement cannot be less because all civil rights and liberties are lost if the renunciation be accepted.

Among the 18,000 aliens and citizens then there interned, including men, women and children, there were approximately 6,714 American citizens of the age of eighteen (18) years and upward. All of the internees then were held in the custody of the W.R.A. and in the

underlying custody of the military authorities. It is to be recalled that at the time that concentration camp was bounded by barbed wire and was patrolled by armed guards while a detachment of military forces kept the camp under constant surveillance. The internees were held under the menacing muzzles of rifles and the constant threat of machine guns mounted in armored tanks. Internal security police were stalking about armed and brandishing clubs. With guns trained on the camp the internees acted precisely as people do when threatened by armed robbers. They yielded up their citizenship. Who, under the circumstances, could have done otherwise?

While so restrained of their liberties eighty (80) per cent of these confined citizens at Tule Lake who were of the age of eighteen (18) years and upward, that is to say 5,371 citizens, in early 1945, signed applications for renunciations of U.S. nationality, all under duress.¹⁴ R. 250-253. In eight other like concentration camps a total of only 151 similarly interned and mistreated citizens signed like applications. The reason there were not more in those camps is to be attributed to the fact that the authorities protected the internees from harm by arresting the development of pressure gangs with the result that the activities of pressure groups in those camps were negligible. No like protection was given at Tule.

¹⁴The remaining twenty (20%) per cent, that is to say, 1,343 citizens of comparable age, did not sign applications for renunciation, the reason being that they were employed in the administrative area or were housed in remote blocks where the pressure groups were inactive or had been removed into the fenced off hospital area by the authorities to protect them from the coercion of the pressure groups operating in the crowded inner internment area. Very few were able to withstand or escape the pressure. R. 239, 266.

That there was something radically wrong at the Tule Lake Center is demonstrated by the inordinate number of renunciations there signed compared to the insignificant total of 151 from all other camps where no fewer than 50,000 citizens and 30,000 aliens were held. (The latter figure is made up as follows: Central Utah, 9; Colorado River, 86; Gila River, 26; Granada, 12; Heart Mountain, 1; Manzanar, 8; Minidoka, 7; and Rohwer, 2.) Of these 151 renunciants the males were removed into internment at Santa Fe, New Mexico and the females to Crystal City, Texas, and after the commencement of this suit accompanied family members to Japan or were released from detention and restored to civilian life in this country.

The reasons for the inordinate number of renunciants at the Tule Lake Center was proximately caused by the duress under which that camp was held by the Government and the pressure group leaders and the fear and terror thereby inspired. The failure of the W.R.A. authorities in that camp to protect them against the alien pressure groups and to allay the variety of fears that beset them contributed to the procurement of the renunciations. R. 234-253, 256-267, 316.

In accepting renunciations the Attorney General first made a finding that a renunciation was "not contrary to the interests of national defense" under Title 8 USCA, sec. 801 (i). This was tantamount to a finding that the renunciant was not a threat to our security. It is significant that the letters sent to many of the renunciants by Assistant Attorney General Herbert Wechsler notifying them of acceptance of renunciations recited merely that

the renunciant "no longer is a citizen" and made no mention of continued detention or intended deportation. The Department then took the view that by renunciation a resident citizen was converted into a resident stateless person. It did not then regard them as having been transformed into alien enemies and did not regard them as being subject to removal to Japan under the Alien Enemy Act. Those letters read as follows:

"You are hereby notified that, pursuant to Sec. 401 (i) of the Nationality Act of 1940, as Amended, and the regulations issued pursuant thereto, your renunciation of United States nationality has been approved by the Attorney General as not contrary to the interests of national defense. Accordingly you are no longer a citizen of the United States of America nor are you entitled to any of the rights and privileges of such citizenship."

Government admits its duress caused the renunciations.

The Government recognized the causative factors which induced the renunciations and states that they were the products of genuine and well-founded fears existing in the citizens' minds at that time. Mr. Burling and Miss Rosalie Hankey summarize the motives, that is to say, the mental fears which prompted the renunciations, as follows:

That a number of the kibeis felt "that they had no chance for life in the United States".¹⁵ R. 198. That the

¹⁵The kibeis have been the most maligned and mistreated group of our Nisei. The name means merely that these citizens have received a portion of their education abroad. It is from the ranks of the kibeis that the army recruited a majority of its interpreters and they are in demand with our army of occupation in Japan where a goodly number of those once interned at Tule Lake now are serving.

citizens confined to the "concentration camp" had been taught that "all men, including themselves, were created equal, only to learn that this principle of the Declaration of Independence did not apply to them". R. 199. That in 1942 the W.R.A. gave all the confined citizens a printed notice that they could remain in the centers as shelters throughout hostilities and in 1943 informed them they would be kept there until they were returned to Japan and suddenly, in late 1944 and early 1945 notified them the Center would be closed within six months to a year and they feared they would be forced out into communities hostile to them. R. 198-201, 374, 381. That the internees then feared that it was necessary for them to renounce in order to have their detention converted into internment so that they could remain in the protective custody of the Government. R. 201-202, 373-5, 380. That alien parents, expecting removal to Japan, believed their children would be drafted (R. 202), and that their families would be separated forever and that renunciation was necessary to preserve family unity and hence parental or familial duress was a factor. R. 203, 373. That generalized belief in stories of atrocities committed against relocated evacuees was a factor. R. 204, 289, 381. That upon arrival in Japan it was necessary for them to have a record of loyalty to Japan (R. 204) to insure safety there. That irrational mass hysteria (R. 205-7, 374) resulting from close confinement, want of Caucasian contacts, lack of reliable news and the generalized ravages from racial discrimination that had endured for several years and panic resulting therefrom were factors. R. 205, 373, 391-6, 384, 393, 395; See also, "*The Spoilage*", Ch. XIII, pp. 333-361. The findings of fact on this

duress made by the district court (R. 476-477) are adequately supported by the Government's own affidavits introduced below and, inasmuch as they are not clearly erroneous, they cannot be set aside. See Rule 52(a) R.C.P.

A renunciation induced in a confined citizen by the then well founded fear that he had no chance for life in the United States is not the product of free choice. A renunciation induced by the Government through the fear that he must renounce in order to obtain the protective security of internment by the Attorney General or be forced out of camp to face mob violence is coercion. It is nothing but the giving to the harassed citizen only a choice between Scylla and Charybdis. A renunciation executed to prevent the forcible separation of family members is not a free choice but a coerced one. The fear induced in confined internees through the repetition of stories of atrocities perpetrated upon relocated Nisei and Issei was the natural result of their internment and was well founded.

Renunciations executed to prepare themselves for acceptance by the Japanese upon their forced removal to Japan are not the results of free choice but are involuntary. Renunciations executed to enable citizens to take up the reins of life in Japan in order to evade indefinite and possible permanent internment in the United States are not the results of free choice but are compelled. In consequence, in admitting the foregoing to constitute the decisive factors which caused the renunciations the Government concedes the renunciations were caused solely by Governmental duress.

In addition to the enumerated fears that the Government admits caused the renunciations sight must not be lost of the fact that the interned citizens then and there were the Government created victims of a combination of the following fears: (1) they were impoverished and had no place to go; (2) they feared the community hostility raging against them on the outside; (3) they feared to leave the center and seek shelter in the mid-west because they believed they would never be permitted to return to the west coast; (4) they feared the alien members of their families had to remain in detention in the Center because they were held under the provisions of the Alien Enemy Act by the Attorney General, ostensibly for deportation to Japan; (5) they feared those still excluded from military areas and against whom individual exclusion orders issued had to remain in internment for an anticipated removal to Japan; (6) members of the families of the interned aliens and still excluded persons feared to apply to the W.R.A. to relocate because relocation would separate them from their families remaining in the Center and, perhaps, forever; (7) they did not believe the camp authorities would permit them to relocate but believed that they were being held for deportation and (8) all of them then were held in the grip of terror by the alien pressure group leaders and did not dare to seek relocation. See R. 235-254, 257-267, 297-301, 391-397.

The Government's affidavits demonstrate that the variety of concurrent fears created in all the renunciants' minds by the Government's mistreatment of them alone deprived them of free will and agency in executing renunciations.

The fact that the citizens believed the most impossible things proves they were held in an actual state of terror by the Government and that they were ready to believe anything and everything at the same time. Such states of mind are those of minds terrorized. No renunciation made while in such a state of mind partakes of free will and none so suffering is a free agent. The rule of terror by the leaders of pressure groups was an incident to the Governmental duress and was caused by that duress.

The Fortas letter.

The Fortas letter (R. 75) was introduced into evidence in the District Court below pursuant to the "Stipulation" (R. 408a) and order submitting the cause for decision on the merits which incorporated it as Exh. 2 (R. 75) as part of the Supplement (R. 62) to the complaint which was introduced as an affidavit on the part of each plaintiff below on the motion for summary judgment and on the pleadings. See R. 223 at 224 so providing.

That letter is an official communication written by the Hon. Abe Fortas as Under Secretary of the Interior who, under Secretary of the Interior Harold L. Ickes, was head of the War Relocation Authority and the officer to whose charge all the internees had been committed by President Roosevelt's Executive Order No. 9102. The letter was written concerning matters of great public interest by that officer in the performance of his official duties concerning matters of which he had official cognizance. It was written on Aug. 6, 1945, while each of the renunciants still was in detention. That detention itself was duress. The recitals of the letter are undeniable.

The letter was part of the *res gestae* and it speaks the truth.

Government news suppression policy.

The W.R.A. exhibited all the vices of a temporary federal agency and seemed to possess none of the finer characteristics of permanent federal agencies. It maintained a special publicity staff in San Francisco and in the Center. This skilled staff was adroit in suppressing news of occurrences at the Center and artful in distorting and slanting news in order to preserve the good reputation of the W.R.A. Its chief purpose was to prevent adverse criticism of W.R.A. policies, shortcomings and blunders and to conceal from the public what went on in an American concentration camp. R. 281. The Nazis were doing the same thing in Europe. No news of the terror in Tule was made public. No news leaked out to the public concerning the renunciation hearings. A dark cloud of secrecy was maintained over the whole terrible program. Neither the W.R.A. nor the Department of Justice was anxious to publicize the matter. R. 247, 249. Evidently it is displeasing to oppressors to have the light of publicity focused on acts of oppression.

The W.R.A., finally conscious stricken at the implications arising from what it long had concealed from the public, confessed to the Department of Justice and to the public that the renunciations were products of coercion, duress, menace and undue influence. See R. 193, 207, 250-3, 262.

Incidental internal duress for which Government was responsible was contributing factor to renunciations.

At the time of the hearings approximately 18,000 aliens and citizens with their children were crowded into the Center. They long had been subjected to a course of intimidation by alien pro-Japanese leaders of pressure groups. The W.R.A. officials had permitted those leaders to operate in the Center and to intimidate and coerce the citizens into applying for renunciation. These internees had been committed to the charge of that temporary federal agency. They were wards of the federal Government. The W.R.A. had betrayed its public trust in allowing them to be terrorized. The Department of Justice betrayed its public trust in accepting renunciations from a people terrorized.¹⁶

Mr. Burling was acutely aware of the coercion at the time. He did not inform the camp authorities of what he saw, heard and understood and did not upbraid them for their irresponsibility in fostering the activities of the pressure groups, for condoning those activities and for

¹⁶It is interesting to note that Edward J. Ennis, formerly director of the alien enemy control unit of the Justice Department, apparently somewhat conscience stricken at the part he once played in the evacuation to renunciation program, has been made a member of the board of directors of the ACLU of N.Y. and, since then, has dabbled infrequently in its ineffectual activities. John Burling who succeeded him as director of the alien enemy control unit ultimately became convinced of the gross injustices perpetrated upon this minority, as his affidavit (R. 147-210) reveals and as also disclosed by the fact that he resigned from the Department and subsequently devoted himself to the problems of war refugees and displaced persons. It is to Thomas M. Cooley II, who succeeded him to that office, however, that this minority is indebted. It was largely through his efforts that the compensation law (Act of July 2, 1948, 62 Stat. 1231) and the relief from deportation provisions of 8 USCA, Sec. 155e, as amended July 1, 1948, 62 Stat. 1206, finally were enacted by Congress.

not halting them. It was not within his province to interfere with a federal agency to which he did not belong. He reported "the existence of the very active pro-Japanese movements in the center" to his superiors. R. 169. Later when the renunciation program was in progress he not only mentioned the fact of duress and coercion but did something about it. No other official of any governmental agency had either the courage, the interest or the desire to say or do anything about it. On his own initiative, as a responsible governmental officer, while at the Tule Lake Center, he wrote an official communication under date of January 25, 1945. It was addressed and delivered to Masao Sakamoto and Tsutomu Higashi, the alien heads of the two pressure groups, warning them and their gangsters to stop the coercion of which they were guilty. He had mimeographed copies of this letter posted conspicuously in that Center for all to read and ponder. It was written with the vague hope it might abate the terror. R. 246. That letter reads, in part, as follows:

"I am well aware that your two organizations have put pressure on residents of this Center to assert loyalty to Japan and that in a number of cases physical violence was employed * * * It is as treasonable to coerce others into asserting loyalty to Japan here as it would be outside. All these activities will stop.

"What is intolerable is that the activities of your two organizations continue. Since those activities are intolerable, they will not be tolerated but, on the contrary, will cease."

Those activities did not stop, however. They increased. R. 247. The renunciations were taken by him and his agents when the activities of these pressure organizations were at their maximum intensity and the terror of the internees had reached its maximum height. The public authorities to whose charge the internees were committed did nothing to protect the internees from the terror. They condoned it. No justification whatever could exist for the Department's acceptance of renunciations under these circumstances and its failure to halt the program then and there and to isolate the pressure group leaders and put an immediate and forcible stop to their activities. This was the least the Government should have done in the performance of its duty to protect the internees. The Government, however, was not then interested in protecting them and had not been for a long period of time and does not now appear to be much concerned about the matter.

The situation existing in that concentration camp called for drastic solution to relieve the internees from the terror. Instead of abating it the Government accepted renunciations from the victims of that terror. Though the disease called for radical treatment the surgeons refused to operate. Mr. Burling wrote his letter. A situation requiring strong emergency measures wound up in this feeble gesture. Official apathy, that avoider of decision, sound judgment and wise policy, was all that followed. The W.R.A. maintained a hands-off policy on the renunciation program. R. 244, 262. The Justice Department did not wish to criticize or rebuke the W.R.A. or to interfere with its jurisdiction. The appellees' citizen-

ship was sacrificed in the interim for lack of intelligent action.

The Justice Department transfers the leaders.

After the majority of the renunciation hearings had been held but while some were still in progress the Department of Justice suddenly embarked upon a half-hearted measure to remedy the terroristic rule that prevailed in the Center. It seized the organizers, officers and leading members of the pressure groups and removed them to Bismarck and Santa Fe. These removals occurred between the end of December, 1944, and the first of April, 1945. R. 182-3. Attention is drawn to the fact that it seized many persons who had been forced to join the organizations as nominal members for security reasons only and not because of any sympathy with the aims of those organizations. The seizures and removals were indiscriminate. The W.R.A. obtained a list of purported members by raiding the organizations' offices. That list was a fictitious one containing the names of many internees who were not members. The leaders had added hundreds of names of internees to the membership lists to convince the W.R.A. it was a larger organization than it actually was and to boast to the internees of a much larger membership than it actually had. R. 239, 265. The W.R.A. picked up many innocent persons who were not members and many who were only nominal members and had them removed from the Center by the Department of Justice. All the leaders who were active in the organizations were removed from the Tule Lake Center and other internment camps to Japan during the period

elapsing between November 25, 1945, and February, 1946.
R. 183, 254, 266.

Presidential Proclamation No. 2655.

On July 14, 1945, under ostensible authority of the Alien Enemy Act, President Truman promulgated Proclamation No. 2655 (10 F.R. 8947) providing, in part, as follows:

“All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject under the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.”

This proclamation referred to the alien enemies mentioned in Public Proclamations 2525, 2526 and 2527 of December 7th and 8th, 1941; No. 2523 of December 29, 1941; No. 2537 of January 14, 1942 and No. 2563 of July 17, 1942, the alien enemies being those of Japan, Germany, Italy, Bulgaria, Hungary and Roumania.

In October, 1945, actual control over the Tule Lake Center was transferred to the Department of Justice. Thereafter, the Attorney General continued to treat the renunciants as though they were alien enemies. He had all of them registered, fingerprinted and photographed

by force. Each was compelled, under protest, in September, 1945, to register as an "alien". The registering officers informed them at the time of registration that they had become "native American aliens".

In October, 1945, the detention of the renunciants became known as internment. The difference is important only from a nomenclature viewpoint. The W.R.A. holds in detention. The Attorney General holds in internment. The dictatorship of the W.R.A. was transformed into a dictatorship of the Attorney General. The executive custody and control persisted. The W.R.A. acted as the managerial agent of the Center for the Attorney General for a short period of time until the border patrol, the police agency of the Immigration Service, appeared on the scene.

Although thousands of the internees sent letters to the Attorney General between February, 1945, and November, 1945, rescinding their applications for renunciation long before they received notices of approval his office recklessly disregarded their letters and insisted upon approving the renunciations even though they had been cancelled. His office sent out hundreds of such notices to appellees after these proceedings had been initiated below. Many of the appellees never have received letters of approval at any time. The Attorney General neither considered nor officially classified any renunciant as being disloyal or dangerous to our security at the time of renunciation although he continued to treat them as though they were alien enemies.

Rescission of individual exclusion orders.

On August 10, 1945, the Japanese Government sued for peace and on Aug. 14, 1945, surrendered on the general terms announced by the Allied Powers at the Potsdam Conference and hostilities ended. Thereafter, September 2, 1945, was designated V-J Day by President Truman. On Sept. 4, 1945, General Pratt promulgated Proclamation No. 24 (10 F.R. 11760) which rescinded all individual exclusion orders which had been issued by army hearing boards that had convened in the Center. It was a blanket rescission of all like orders and was a finding that none of those renunciants against whom such orders had issued was dangerous to our security.

The mitigation hearings.

Thereafter, the Attorney General embarked upon a reckless removal program for all renunciants. He scheduled the first group for deportation to Japan on November 15, 1945. The Justice Department did not anticipate any interference with this oppressive plan.¹⁷ However, these suits and companion proceedings in habeas corpus below

¹⁷In 1945 Abraham L. Wirin, erstwhile and sometimes an attorney for the ACLU of Sou. Cal., a branch of the ACLU of N.Y., testified before the Dickstein Congressional Committee that all renunciants should be deported. For undisclosed reasons which, however, are not difficult to guess, he subsequently suffered a change of mind for his name appears on a brief for Inouye, Sumi and Shimizu in appeals Nos. 11830 and 12082 decided by this Court. Just before these cases and the companion proceedings in habeas corpus were instituted in the court below Nanette Dembitz, one time attorney for the Justice Department, prognosticated, in 45 Columbia Law Review 175, 179, that there was not likely to be any litigation over the renunciation program. She, too, has undergone a reversal of opinion for her name appears as an amicus curiae on that same brief. Apparently modern oracles and sibyls are no more accurate in their auguries and prophesies than their prototypes.

intervened on November 13, 1945, and prevented the removal.

When these suits were filed below the Attorney General was detaining for removal to Japan approximately 4,700 native-born Americans of Japanese ancestry in the Tule Lake Center, and in internment camps at Bismarck, N. D., Santa Fe, N. M., and Crystal City, Texas. These suits halted the removal proceedings. Thereafter, administrative orders to show cause before Government examiners selected by him were issued compelling them to show cause why they should not be removed from their native soil to Japan. No such written orders were served upon the renunciants or their counsel. The orders appear to have been in the form of verbal instructions given by him to his agents.

Each renunciant was subjected by the Government examining officers to such an arbitrary administrative examination between the middle of December, 1945, and the first of April, 1946. The renunciants were denied the privilege of being represented by counsel at these examinations. R. 287. They were denied the assistance of friends. R. 303-4. See *Stipulation* dated and filed Jan. 2, 1946, (R. 59) wherein appellees protested the denial of their rights. R. 303. The Government allowed four impartial observers to visit the Center at the time. These were Ann Ray, Catherine Porter and Ernest Besig of the A.C.L.U. of Nor. Cal. and Theodore Tamba, Esq. They were appalled at the contagion of fear they witnessed. R. 287-8, 301-317. These pseudo-hearings were nothing but Star Chamber proceedings. They were perfunctory.

The factors determining whether a person would be released were arbitrarily decided upon and were not revealed to the renunciants. R. 305, 307. The renunciants had no method of obtaining the compulsory attendance of witnesses. R. 303-4. The Government examiners questioned them from material contained in dossiers in the examiners' possession which was not exhibited to them. None of the renunciants was told by the examiners that they were deemed or considered to be alien enemies or that they would be removed to Japan. R. 306. They were informed that if they were successful in the examinations they would be released from detention. R. 306. Evidence was exacted from them, however, by the examiners.

On February 12, 1946, when approximately 1800 of the scheduled examinations had been completed the Attorney General had posted in the Center a list of 449 names of those examined who were said to have received unfavorable recommendations from the examiners. None of those subsequently examined there were added to that list. This fact demonstrates that a release from detention did not depend upon the examinations but upon predetermined factors. Those whose names appeared on that list were denied release and were scheduled for continued detention and removal to Japan simply because they were kibeis or their next of kin were in Japan or for other capricious reasons. The hearings were farcical—the recommendations of the hearing officers were of no importance. They were nothing but face-saving devices designed to lend an appearance of fairness and legality to the proceedings. Administrative examinations as conducted by administrative officers leave much to be de-

sired but these conducted by the Attorney General's agents violated all concepts of fairness and impartiality.

However, the Attorney General relented. A review of the files of the 449 did not end on March 20, 1946, when the Tule Lake Center was closed out but continued after they had been transferred to Crystal City, Texas, and thence to Bridgeton, N. J. Since then all of the 449 have been released from detention.

The first intimation that the Attorney General gave that he considered any of the detained renunciants to be dangerous to our security was after the last of the renunciation hearings had been concluded. After these suits had been filed below and the mitigation hearings had been finished the Department of Justice awakened to the realization that its removal program was in violation of its own regulations for want of individual notice to the victims. To justify the illegal detention and threatened removal under the Alien Enemy Act and Presidential Proclamation No. 2655 the Department thereafter sent notices to each detained renunciant informing him that he was an alien enemy scheduled for deportation. No hearing at any time was accorded any of them on the subject of being either an alien enemy or one dangerous to our security. Labeling and classification by fiat is become a practice of executive agencies bred by war.

Since the institution of these suits all the internees have been released from immediate detention and have relocated in civil life in this country.

Of the total number of persons once confined to the various centers approximately 8,100 have been transported

to Japan. This figure includes some 6,800 aliens and their citizen children who were transported to Japan either because of a preference arising from resentment, despair resulting from their mistreatment or simply because they were obliged to accompany aged parents who were impoverished and had no choice except to be repatriated to Japan. The organizers, leaders and moving spirits of the pressure groups in that Center and in the other camps, after the commencement of these suits, were removed to Japan. R. 180-183, 254, 266. The fear which they had inspired in the internees and the terror in which they had held them abated as these Government created fanatics were removed.

SUMMARY OF ARGUMENT.

The renunciation of adult, infant and insane appellees, executed under the provisions of the renunciation statute which was applied exclusively to them upon a discriminatory ancestral type basis pursuant to the special purpose for which it was enacted, during their unconstitutional imprisonment are void for being the products of governmental duress, coercion, menace, intimidation, fraud and undue influence.

ARGUMENT.

THE RENUNCIATIONS ARE VOID.

I.

RENUNCIATIONS EXECUTED TO TERMINATE FALSE IMPRISONMENT ARE VITIATED.

The military commander originally imprisoned the appellees by force and by threats. Even if the evacuation by him could be justified his imprisonment of them and the continuation of that imprisonment by the W.R.A. and the Attorney General could not be. That imprisonment was *prima facie* unlawful imprisonment. In consequence, there rested upon the appellants, as the imprisoning agents for the Government, the burden of proving it was lawful. In view of the evidence as well as of facts of which the court had judicial knowledge it was impossible for them to sustain that evidentiary burden. See 22 *Amer. Juris.* 421-422, where this rule is stated as follows:

“The burden of proof in an action for false imprisonment is upon the plaintiff until a *prima facie* case has been made out. If the plaintiff shows that the imprisonment was by force or threats or without process of law, the presumption arises that the imprisonment was unlawful, and he has established a *prima facie* case. The burden of proof is then upon the defendant to justify the imprisonment by showing that it was effected under lawful authority. * * * If he does * * * the * * * plaintiff must show something more than mere detention and imprisonment, and he still has the burden of showing illegality.”

In view of the foregoing rules it is obvious that the appellants herein could not overcome the presumption of

the unlawfulness and illegality of the imprisonment of the citizen appellees by the military commander in 1942 and the prolongation thereof by the W.R.A. and the Attorney General.

There can be no doubt that the evacuation of our own citizens on a racial basis from eight western states and their imprisonment was unjustified. If mere evacuation was excusable at the precise time it was ordered, as indicated by the Supreme Court in *Korematsu v. U. S.*, 323 U.S. 214, their confinement following evacuation was wholly unwarranted and was unconstitutional as a violation of the due process of law clause of the 5th Amendment. Their imprisonment was a false, illegal and actually a criminal imprisonment. See concurring opinion of Denman, C. J., in *Takeguma v. U.S.*, (C.C.A. 9), 156 Fed. (2d) 437, at 442.

A wrongful imprisonment or a threat renders a contract void if the contract was entered into for the purpose of obtaining a release from the imprisonment or for terminating the threat. See *Weir v. McGrath*, (D.C. Ohio), 52 Fed. (2d) 201, 203, involving duress imposed by statute; *Brown v. Pierce*, 7 Wall. 205, 215; *N. Y. Life Ins. Co. v. Talley*, (C.C.A.-7), 72 Fed. (2d) 715, 718; and 3 *Wigmore on Evidence*, (3rd ed., 815, 822, 824.) See also the rule stated in *Radich v. Hutchins*, 95 U.S. 210. Consequently, whether renunciations were executed to insure internment in order to escape falling victim to mob violence on the outside or to be removed to Japan in order to escape prolonged imprisonment they are involuntary and being the products of duress are void.

II.

THE DURESS VITIATES THE RENUNCIATIONS.

There are several distinct types of duress. Each appellee was the victim of a concurrence of the types. The Government itself was guilty of the duress and the pressure groups and gangs in the Center were guilty of coercion which was an incident thereof. In Sec. 1569, Cal. Civil Code, duress is defined as consisting in the unlawful confinement or detention of a person or of members of his family and also of the confinement of such a person, lawful in form, but fraudulently obtained or made unjustly harassing or oppressive. Those types are the same as those specified at common law, as summarized in 17 *C.J.S.*, 530, secs. 171, 172, as follows:

“Under the common law doctrine duress of imprisonment arises where a person is actually imprisoned for an improper purpose without just cause, for a just cause without lawful authority, or for a just cause and under proper authority but for an improper purpose.”

17 *C. J. S.* 530, sec. 171.

Under each of these rules the detention of the appellees was duress and their renunciations were void as the product of that duress. Each of the appellees had been imprisoned for four years without hearing on the reason for his imprisonment and without any charges being filed against him. Neither a proper purpose nor a just cause can be found to justify either their original imprisonment back in 1942 or its continuation. Their imprisonment first by a military commander, then by the W.R.A. and finally by the Attorney General without lodging an accusation

against them and affording them trials on the reason and grounds for this terrible punishment inflicted upon them violated the provisions of the 4th, 5th, 6th and 8th Amendments. It was a deliberate attempt of the Government to repudiate all their rights of citizenship and hence of citizenship itself in violation of the letter and spirit of the Constitution. The treatment was cruel, infamous and inhuman and the renunciations were the direct result of that mistreatment. It vitiates the renunciations under the rule that:

“Maltreatment while under arrest on a well founded charge will invalidate an act produced by such maltreatment.” 17 *C.J.S.* 530, Sec. 171.

Even if the original act of evacuation from the western states were to be deemed lawful, while we assert it was both unlawful and criminal, the fact that the detention of the appellees was continued from the evacuation date in 1942 to 1948 was and is duress and the renunciations caused by that illegal imprisonment are vitiated as the result of that duress. The rule is:

“Although the imprisonment is originally lawful, yet if the party detains the prisoner unlawfully, it is duress.” 17 *C.J.S.* 530, Sec. 171.

The Government and the leaders of the pressure groups in the Center were guilty also of another form of duress. It was maltreatment on the part of the Government to imprison the appellees autocratically and deprive them of all their basic rights and liberties in the absence of crime upon their part. That contributed its part in compelling the appellees to renounce. The omission of the

W.R.A. to protect these citizens who were committed to its charge against the activities of the pressure groups leaders constituted maltreatment of these citizens and contributed its part in compelling them to renounce. By maintaining the language schools in the Center for the purpose of preparing them for life in Japan on removal, the W.R.A. led them to believe they would be forcibly deported and this fear of deportation played its part in the renunciations. By fostering those schools which it knew carried on a steady campaign to indoctrinate American children with pro-Japanese sentiments the W.R.A. contributed to their renunciations. These things constituted maltreatment which was duress which vitiates the renunciations.

If the Government had not first evacuated, interned and branded and then repudiated the citizenship and citizenship rights of those persons there would not been any pressure groups and the active leaders of those organizations would not have renounced at the express solicitation of Mr. Burling and would not have been removed between the end of December, 1945, and February, 1946, to Japan, and those organizations would not have terrorized the residents of the Center and there would not have been any renunciations at all. The Government was responsible for the activities of the terrorists. They were irresponsible victims of the Government's oppression. It drove them into a desperate position where they were propelled by the currents of fear to respond in that fashion. That was foreseeable human behaviour inherent in a percentage of oppressed persons. In consequence, it was directly responsible for the existence of

those organizations and for everything those organizations did. They were Government created organizations.

It is to be noted that in *Korematsu v. U. S.*, 323 U. S. 214, the Supreme Court declared the mere act of transferring persons of Japanese descent from the west coast was valid at the time of evacuation because it would assume that at that particular time there may have existed facts then known by the military commander but not revealed by him that might have justified exclusion from given areas as a necessary emergency military measure. That Court, however, took pains to avoid declaring their imprisonment was either justified or lawful. In *Ex parte Endo*, 323 U.S. 283, that Court declared it to be unlawful to hold imprisoned in a W.R.A. Center a citizen who had been found to be loyal. There can be no doubt that "freedom from bodily restraint" is within the due process guaranty. See *Meyer v. Nebraska*, 262 U.S. 390, 399. It is significant that in *U.S. v. Kuwabara*, 56 Fed. Supp. 716, District Judge Goodman declared persons held in the Tule Lake Center as though they were disloyal were held in duress.

The Government itself, through the medium of civilian exclusion orders, threatened the appellees with imprisonment for a violation of those orders and, for obeying those orders, imprisoned them. The W.R.A. continued the imprisonment. The Attorney General into whose custody they passed prolonged their imprisonment and then threatened to remove all of them to Japan and still threatens to remove 292 of them to Japan. This was and is *duress per minas*.

“Duress per minas arises when a person is threatened with loss of life, with loss of limb, with mayhem, with imprisonment * * *.” 17 *C.J.S.* 530-31, Sec. 172.

The alien terrorists in the Center held all of the plaintiffs and all other residents in the Center in a grip of terror by threats against their lives and persons, by threats that if they did not renounce and ask for removal to Japan that when they were deported to Japan they would be arrested, imprisoned, and punished for having opposed the pressure group leaders, movement and objectives. The residents believed those threats would be carried into execution. Their renunciations were executed when they believed in those threats and had good reason to believe in their fulfillment. They are void as being the products of *duress per minas*. See also 5 *Williston on Contracts*, 4533, Sec. 1621, discussing duress by threats of injury.

At common law “duress of the person” whether by imprisonment or by threats, always vitiates consent. See *Odgers on the Common Law*, 3rd ed. Vol. 2, p. 62, citing *Scott v. Seabright*, (1886), 12 P.D. 21, and *Ford v. Stier*, (1896), P. 1, and *Kaufman v. Gerson*, (1904), 1 K.B. at p. 597, declaring:

“A contract made by a person under duress is voidable at his option. If the will of a party is coerced, it does not matter whether the pressure be physical or moral.”

The Government gave these people no chance of release from detention except through renunciation which was

to be followed either by removal to Japan or by prolongation of the internment. That was duress. The rule in equity which vitiates a document executed under duress is aptly phrased in 17 *C.J.S.* 532, Sec. 173, as follows:

“Under the modern rule now generally recognized a contract obtained by so oppressing a person by threats as to deprive him of the free exercise of his will may be avoided on the ground of duress whether or not the oppression causing incompetence to contract amounts to what was formerly deemed duress at law or merely to the wrongful compulsion remedial in equity.”

The evidence offered in the court below by both sides describes the conditions and circumstances which confronted the internees and the combination of real and genuine fears which beset them at the time of their renunciations and which caused them to renounce. They narrate not only the means by which the renunciations were obtained but the then existing state of minds of the renunciants and the fears under which they labored. To set aside an instrument for duress the modern doctrine recognizes that the test does not lie so much in the means by which its execution was compelled as in the *state of mind* that causes it. As stated in 17 *C.J.S.* 534, Sec. 175, the rule is emphasized as:

“* * * it is the state of mind induced by the means employed—the fear which made it impossible for him to exercise his own free will.”

The fact that the Government and its officers or agents may be guilty of duress, menace, undue influence, coercion or fraud which vitiates an instrument is too well established to admit of doubt. See *Brown v. Mississippi*, 297

U.S. 278. As a matter of law, inasmuch as duress was the cause of all the renunciations, a renunciant could not *ratify* the duress and the Government cannot ratify that duress. See 5 *Williston on Contracts*, p. 4348, sec. 1626.

Renunciations obtained by reason of duress possess no more validity than confessions obtained by Government agents by reason of duress. They are involuntary and are the products of coercion. See, *Upshaw v. U. S.*, 335 U.S. 410, invalidating a confession which was induced by illegal detention. See also, *McNabb v. U. S.*, 318 U.S. 322, 324; *Malinsky v. N. Y.*, 324 U.S. 401, 405, and at 407 where it is declared that a document which "was the product of fear" cannot stand; See also, *Ashcraft v. Tennessee*, 327 U.S. 274 and also *Ashcraft v. Tennessee*, 322 U.S. 143, 153; *White v. Texas*, 310 U.S. 530; *Chambers v. Florida*, 309 U.S. 227, 230; *Ziang Sung Wan v. U. S.*, 266 U.S. 1, 10. See also, *Lee v. Mississippi*, 332 U.S. 742, 745, declaring a confession which is the product "of other than reasoned and voluntary choice" is void. See also, 3 *Wigmore on Evidence*, p. 253, sec. 725 et seq.

It is to be noted, also, that the burden of proof rested on the appellants to show that the renunciations were voluntary and were not induced by duress. See 3 *Wigmore on Evidence*, p. 342, sec. 860. The appellants, defendants below, were given adequate opportunity so to do but failed to meet that burden. Obviously, they were unable to prove any such thing. Their own affidavits admitted into evidence below alone prove that all the renunciations were the result of duress. Inasmuch as the facts relating to the renunciations which were conceded by the Government's own affidavits below were irreconcilable

with the existence of mental freedom of the appellees it was the duty of the court below to invalidate the renunciations. See rule stated in *Lyons v. Oklahoma*, 322 U.S. 596, 602.

Mr. Burling's affidavit, R. 207-208, states that the appellees "were confined in a concentration camp at the time they renounced"; that there was existing in that camp "a very high degree of excitement whipped up by organizations admittedly extremely pro-Japanese"; that the renunciations took place at a time when the renunciants and their families "were in extreme fear of being forced out of the Center into hostile communities where they believed their lives would be endangered and that the only way they could save themselves from that danger during wartime was to make themselves eligible for Department of Justice internment." At R. 203 he states the existence of the fear that their failure to renounce would split the families and forever separate them and that this could be prevented only by renunciation. Therefore, the Government admits that the internees had a choice of (1) being cast out from the Center to face the possibility of mob violence on the outside or (2) to renounce and thereby become eligible for internment as protection against lynch law. Obviously, persons held in such great fear would exercise the second choice instinctively. But a choice between two evils is not a free choice. What is especially shocking is that Mr. Burling who presided over the renunciation hearings did not refuse to proceed with the examinations when he realized the fears of the internees. Apparently he was not aware of the fact that this constituted the taking by the Government of a gross

advantage over its wards and that such constituted undue influence and duress by the Government which invalidates those renunciations. Until he first visited the Center neither he nor the Justice Department knew definitely what was going on at that Center although the Department's suspicions had been aroused by the unanticipated and unexplained receipt of applications for renunciations. The camp officers did not enlighten him as to the true condition that had existed in the inner area or colony where the citizens were confined. He heard about the duress, however, from the project attorney, R. 244. The camp officers were not interested in making a complete confession to him of the coercion exerted upon the internees by the leaders of the pressure groups. They were not anxious to inform him that they had allowed the internees to be terrorized.

It was not the Department of Justice which primarily was to blame for what went on at the Tule Lake Center. That blame falls upon the shoulders of the W.R.A. However, Mr. Burling observed occurrences at the Center and was aware of the unrest, fear and danger in which the whole camp labored. He reveals that the W.R.A. knew that the renunciations were the products of coercion and that W.R.A. officials finally notified the Justice Department of that internal duress when they realized a disclosure would not jeopardize their own positions and when their consciences thereby became divorced from self-interest. R. 193, 207. Mr. Burling and his examiners were not entirely deaf or blind to the torment and terror in which the internees were held at the time. Nevertheless, they accepted renunciations because they, too, actually

viewed them as mere Japanese and were apathetic to the predicament of the prisoners. The acceptance of renunciations from a number of citizens who were known to be insane (R. 288, 307-8) demonstrates that apathy and reveals recklessness as well.

III.

THE MENACE VITIATES THE RENUNCIATIONS.

When the appellees were driven into assembly and relocation centers in 1942 the evacuation was completed. Their detention, however, was continued without any of them at any time being given any hearing on the question of the cause or necessity for their detention or removal. A continued detention was forced upon them by the military commander and the W.R.A. Both the forcible evacuation and forcible detention were threats by the Government of imprisoning them for an indefinite period of time. That was menace, i.e., it was governmental duress by imprisonment. See 5 *Williston on Contracts*, 4506, Sec. 1609. In evacuating and imprisoning them the Government branded them guilty of an unknown and unspecified crime and in holding them under duress it publicly branded them criminal and held them up to public ridicule, obloquy and hatred. That was governmental menace. See *Cal. Civil Code*, section 1570, defining menace. The menace played its rôle in causing the renunciations.

The threatened closing of the Center in January, 1945, aroused fear in the internees that they would be thrust into civilian life in communities hostile to them and that

to abate this generalized fear the Justice Department and the W.R.A. agreed to withdraw the announcement of the closing to allay their fears. The W.R.A. failed to withdraw the announcement and, instead, announced the Center would be closed within a year. That announcement alarmed the internees into believing that since "the Department of Justice was thought to have authority only to operate internment camps, it followed that, in order to remain in a camp, it would be necessary for them to become subject to internment as an alien enemy". R. 202. That fear alone deprived them of freedom of choice in renouncing because of their belief that if they refused to renounce they would be driven back into civilian life to face mob violence in communities where hostility raged against persons of Japanese lineage. It is apparent that anyone laboring under such a fear would say anything at a renunciation hearing that would result in an acceptance of that renunciation. It was not to be expected that such a person will state he was renouncing because of that fear when, by so doing, he might be forcibly ejected from the camp only to succumb to the mob violence he was seeking to escape.

IV.

THE UNDUE INFLUENCE VITIATES THE RENUNCIATIONS.

The Government also was guilty of undue influence in obtaining the renunciations. Undue influence consists in the use by one who holds a real or apparent authority over a person of that authority for the purpose of obtaining an unfair advantage over him either by taking an unfair advantage of another's weakness of mind or in

taking a grossly oppressive and unfair advantage of another's necessities or distress. See *Cal. Civil Code*, sec. 1575; and 17 *C.J.S.* 539.

The Government evacuated and detained all the appellees and treated them as though they were alien enemies. It exercised an authority over them which was not only real and apparent but was absolutely autocratic. Without reason and without affording them hearings it detained them for years without a chance of being liberated. It cast them into the Tule Lake Center. It held them there. It let them be subjected to the undue influence and coercion of the pressure groups. It afforded them no protection against those groups. It conducted renunciation hearings in that concentration camp while the internal terror was raging. The Government was aware of the fact that they were living in an abnormal state of fear and that they were tormented and terrorized. With full knowledge of the conditions and of the tortured minds of the internees the Government took a grossly oppressive and unfair advantage of their necessities and distress in taking their renunciations. The Government's affidavits admit these conditions existed before and while the renunciation hearings were being held. Although undue influence is only a comparatively mild form of duress, it is, nevertheless, an adequate ground for cancellation of an instrument executed thereunder. See 5 *Williston on Contracts*, p. 4495, defining duress as the extreme of undue influence.

All the internees were under the dominion and control of the Government at the time of renunciation. They were wards of the Government. All of them were

under the dominion of the pressure groups at the same time. The Government and the pressure groups were guilty of exercising undue influence in procuring those renunciations. Documents executed under such an influence are involuntary and invalid. An excellent definition and description of undue influence is set forth in 5 *Williston On Contracts*, pp. 4541-4542, sec. 1625A. It cites the definition made by Lord Selborne, L.C., in *Earl of Aylesford v. Morris* (1873), 8 Ch. App. 484 at 491, which has found general acceptance in Anglo-American jurisprudence. That decision defines it as any

“unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact, fair, just and reasonable.”

“But it is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience and moral imbecility.”

None of the appellees was represented by counsel at the renunciation hearings. None had a chance to obtain such representation. None had the benefit of independent legal advice on the matter. All were deprived of the benefits of such representation. All were in a concentration camp at the time. All were held in duress. All were the victims

of the undue influence of the Government and the pressure groups. It was in the *Earl of Aylesford* case, *supra*, pp. 490-1, and quoted in 5 *Williston On Contracts*, in note at 4542, that the rule was established that the undue influence which vitiates an instrument executed by a person dominated by another in the absence of independent legal advice is something more than mere fraud. It declares:

“Fraud does not here mean deceit or circumvention; it means an unconscientious use of power arising out of those circumstances and conditions * * *”

A document which is executed by a person held in custody who has been denied the benefit of counsel is involuntary and the product either of undue influence or outright coercion and is void for duress. See *Von Moltke v. Gilles*, 322 U.S. 708, 715; *Malinsky v. N. Y.*, 324 U.S. 401, 405; *White v. Texas*, 310 U.S. 530, and *Chambers v. Florida*, 309 U.S. 227.

Inasmuch as the relationship of dominance over the appellees by the Government existed at the time of renunciation, there is a presumption that the Government was guilty of undue influence. Consequently, the burden of establishing that the renunciations were the free acts of the appellees rested upon the Government. See 5 *Williston On Contracts*, p. 4542, in note to Sec. 1625A, stating that this presumption was decided in early English cases to be irrebuttable, and citing and quoting from *Liles v. Terry* (1895), 2 Q.B. 679, where it is stated:

“It was formerly thought in England that the presumption was irrebuttable in the absence of competent and independent advice.”

As Williston there points out the rule was partially relaxed in *Noriah v. Omar* (1929), A.C. 127 (P.C.) noted, (1932), 173 L.T. 149, holding that rebuttal evidence should not be disregarded "simply because the donor did not receive independent legal advice".

The appellees herein, however, were deprived of the right to counsel and to independent legal advice at the renunciation hearings as a matter of governmental policy and the dominance that the Government maintained over them at the time was complete and absolute. The Government knew that they were not in their right minds and that they could not have been because of their despair arising from their prolonged internment without the possibility of release. It knew of their fears of deportation, of outside hostility and of the splitting of their families and of pressure group violence. There exists no possibility whatever of the presumption of undue influence being overcome by the appellants. In its affidavits and its answer the Government admits the undue influence. The renunciations, therefore, are void as the products of that undue influence.

V.

THE FRAUD VITIATES THE RENUNCIATIONS.

The Government was guilty of deception in its treatment of all the appellees. It was guilty of *actual fraud*. It evacuated all of them. It concealed from them that by evacuation the military commander intended not mere evacuation from the vicinity of military installations but imprisonment in concentration camps. It kept them im-

prisoned. Having led them to believe they would be evacuated to areas where they would be free to follow their civilian pursuits it incarcerated them in prisons. Knowing that the internees feared the community hostility raging against them outside the Tule Lake Center and that they feared the Government would cast them out of detention and force them to fall victims to mob violence in hostile communities, the Government accepted their renunciations so that they could escape that hostility by becoming eligible to remain in the protective custody of the Government-controlled Tule Lake Center. It concealed from them the fact that its protective custody would be protracted until the Government found the time and means to remove them to Japan as though they were hostile alien enemies. The execution of the renunciations, in consequence, was pursuant to a suppression of knowledge of the fact the Government intended to detain and remove them to Japan if they renounced or to eject them so they would fall victim to mob violence on the outside if they did not. This constituted actual fraud perpetrated upon these citizens by their own Government. See *Cal. Civil Code*, sec. 1572. Moreover, it was duress.

The mistreatment inflicted upon the appellees also included constructive fraud by the Government. Each citizen was entitled to fair treatment by the Government and to freedom from discrimination. None received either of these at any time. Each was entitled to be informed of the consequences of renunciation which the Government intended to put into operation upon approval of the renunciations. Not one citizen was told of the irrevocability of the act of renunciation. Not one was told

that the Government would view the act of renunciation as an act transforming the citizen into an alien enemy. Not one was told that renunciation was intended to result in or that it would result in his or her forcible removal to Japan. These facts were concealed from the citizens. If the Government at the time of renunciation did not view the act as one converting the renunciant into an alien enemy which would be followed by removal to Japan it is obvious that none of the examiners told any of the citizens about even the possibility of such consequences to renunciation. They could not have done so because such was not then even in the Government's contemplation. They would have been presumptuous to have informed any of the citizens of matters on which the Attorney General himself had not expressed an opinion.

It is tragic to think that these examinations were conducted by the Government when, as Mr. Burling's affidavit (R. 188) states, "It was universally agreed that the rush toward renunciation was illogical and unreasoned" and that

"It was a commonplace witticism among the officials of the Center at the time of these hearings that the population of the Center was largely mad and that the Center might properly be taken from the management of the War Relocation Authority and transferred to the Public Health Service to be run as a species of mental institution".

What he saw was a form of generalized insanity induced by fear caused by the internment, the hopelessness of their situation, their despair, the terror that reigned against them in the Center and the terror that raged

against them on the outside and the apathetic attitude of the W.R.A. towards them and its failure to protect them. What other behaviour would one expect of citizens held in terror for months and years? The Tule Lake Center was a fear-crazed concentration camp at the time of the renunciations. What the Department of Justice actually did was to obtain renunciations from inmates interned in a large mental institution.

Mr. Burling expressed his hearsay opinion that none of the renunciants asserted "he was being coerced into renunciation". R. 207. Persons in terror never mention terror at the time. Insane people do not conduct themselves as rational beings. What the herd does all do. Insane people don't admit their insanity. They act it. Only the blind fail to notice mental instability, fear and terror. The oppressor neither notices nor becomes aware that his own conduct is oppressive—the oppressed are too disturbed to analyze their emotions or rationalize.

However, each and every appellee, so soon as he was assured of some protection, revealed that he was coerced into renunciation. When counsel for the appellees visited Tule he was consulted by a number of these terrorized internees, advised them of their legal rights—informed them that if the W.R.A. did not relieve them from the still active terror that the dereliction of the officials responsible would be publicly exposed. R. 253. Thereupon thousands of letters rescinding the renunciations were mailed to the Attorney General.

VI.

**DENIAL OF DUE PROCESS AT RENUNCIATION HEARINGS
VITIATES RENUNCIATIONS.**

At these hearings, held in prison, each appellee was deprived by the Attorney General of the benefit of counsel, and of all of the incidents of a fair and impartial hearing. Each was deprived of the benefit of independent advice of friends. The hearings were not open hearings. They were casual, brief and perfunctory. R. 177, 178. Each renunciant was examined separately in a closed room where he was closeted with agents of the Government which had tortured him, harassed him and still detained him. These were Star Chamber proceedings. They were inquisitions. None were allowed to have friends present. None were informed of their rights. None had any rights that were recognized. Each long had been despoiled of all rights. None were informed by the Government examiners or any one else of the irrevocability of the act of renunciation or of its significance and none was apprised of the consequences. This, in itself, was a denial of due process of law guaranteed by the 5th Amendment. See *DeMeerleer v. Michigan*, 329 U.S. 663; *White v. Texas*, supra; *Malinsky v. N.Y.*, supra.

Punishment inflicted for crime deprives one of certain civil rights. Renunciation, as interpreted by the Attorney General, deprives one of all civil rights. A person charged with crime where the penalty is a loss or suspension of civil rights is entitled under the 6th Amendment and the due process clause of the 5th to a fair and impartial judicial trial before he may be deprived of the enjoyment of those rights. It follows that because renunciation pun-

ishes a person by depriving him of all civil rights that he is entitled at a renunciation examination to a fair and impartial judicial or administrative hearing in order that the minimum requirements of due process of law be satisfied before he can be deprived of those rights and that neither the Executive nor Congress may dispense with those requirements.

Common criminals about to plead guilty in a judicial proceeding to charges of crime which results in the loss of civil rights are entitled to receive an instruction from the court on the irrevocability of a plea of guilt and the significance of that plea and the nature of the punishment provided therefor when they are not represented by counsel of their own choosing or court appointed. Such an instruction is a traditional and fundamental part of due process of law. Were it otherwise we would be living in a police State such as were Germany and Japan and such as is the Soviet Union. In addition to such an instruction it is the duty of a court, under Anglo-American concepts of due process, to make certain that the defendant is free from menace, intimidation, undue influence and duress at the time his plea is entered. It is to be noted that an accused person has been allowed the privilege of bail and access to the services of counsel and to the assistance of friends. At the time of his appearance in court he either has been bailed or has had the opportunity to be bailed and is not under duress. Here none of the citizens had access to the services of counsel or the assistance of friends. None was given any chance of being bailed. Each was constrained of his liberty and had no avenue of liberation open to him except to renounce either

to be ordered interned to escape lynch law or to be removed to Japan to escape permanent imprisonment. Each was held under duress.

Renunciation hearings, as applied by the Attorney General, were intended to result in the renunciants' detention to be followed by their removal to Japan before or after the end of the war. These significant facts were concealed from the renunciants. None was informed of the irrevocability of renunciation or that it would result in detention for the duration of the war or removal to Japan at or before its close and none had any knowledge of any such thing or the means to acquire any such information. If that was the purpose and intent of the Attorney General in accepting renunciations it was kept absolutely secret from the renunciants. Those renunciation hearings, therefore, were nothing but mock hearings on verbal *lettres de cachet* issuing from the Attorney General.

VII.

CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional issues involved herein which are not specifically discussed herein are contained in our brief filed in the companion appeal proceedings Nos. 12,195-6 in habeas corpus.

CONCLUSION.

The unbelievably cruel program that was instituted against our citizens of Japanese lineage by a military commander in 1942 has been perpetuated against a number of

them to the present time by federal agencies. It has been a form of war we have waged against them simply because of the geographical origin of their forebears.

Not content with ousting them from their homes and confining them to concentration camps and enslaving them, and enslaved they were, the government endeavored to deaden their minds and destroy their spirits. It nearly succeeded in Tule. The human spirit, however, is not a product of the government but a thing of God that defies oppression. The measure of a man is not by pigmentation. The value of a citizen does not lie in his color. These people bore their cross uncomplainingly. Many were resentful of their mistreatment but they suffered in silence in the hope and belief that their acquiescence in doing what the government commanded would produce a change in the government's attitude toward them. They did not know the government. It was official enmity toward them that caused them to be mistreated and it was public apathy that enabled the government to do it.

Having inflicted the gravest type of injury upon these people the government sought to justify its evil in characteristic manner. It tried to brand them disloyal while declaring its own innocence. It blackened their reputations while whitewashing its own. Robbing individuals of their good reputations apparently is not a crime when it is done by the government.

The spirit of brute force hovers over the land and evil practices are tolerated, sanctioned and justified because those who command the force easily confuse and delude us by trading upon our fears, our ignorance and our indifference. What happened to these citizens was brutal. We are asked to believe that brutality is its own justifi-

cation. It is a strange philosophy in which we are asked to put our faith. Citizens are become anvils upon which the government must hammer. The products are—what one would expect of such relentless pounding. Is the government ashamed of the creatures of its own forging that it subjects them to this abuse? Is it to be allowed to punish them for what it has done to them and for what it drove them to do?

The oppression of these American citizens is the most incredible outrage in the annals of the nation. That it becomes necessary for this court to pass upon the issues herein is proof of the relentless campaign of terror waged for eight long years by the government against an oppressed minority whose only crime consisted of being—American citizens. What these have borne uncomplainingly and in silence reflects discredit upon the federal agencies responsible. For the suffering they have endured they deserved more consideration and received less than any group within the life span of the Republic. The injury done to these citizens is an injury done to all citizens. It is a pity that those who inspired the persecution of these citizens and those who condoned it do not wear externally the mark of dishonor they bear internally that their guilt be apparent and they become objects of scorn to all lovers of human dignity, justice and liberty.

The judgments below should be affirmed.

Dated, San Francisco, California,

February 27, 1950.

Respectfully submitted,

WAYNE M. COLLINS,

Attorney for Appellees.

Nos. 12251 and 12252

**In the United States Court of Appeals
for the Ninth Circuit**

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF
THE UNITED STATES, ET AL., APPELLANTS

v.

TADAYASU ABO ET AL., APPELLEES

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF
THE UNITED STATES, ET AL., APPELLANTS

v.

MARY KANAME FURUYA ET AL., APPELLEES

ON APPEALS FROM JUDGMENTS OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

APPELLANTS' REPLY BRIEF

FILED

MAR 30 1950

PAUL P. O'BRIEN,

CLERK



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*ON APPEALS FROM JUDGMENTS OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION*

APPELLANTS' REPLY BRIEF

APPELLEES UNDER ALIEN ENEMY REMOVAL ORDERS

In view of the statements in appellees' brief (e. g. p. 3) indicating a belief that only 292 of them continue to be under alien enemy removal orders, the records have been carefully rechecked and it has been found that the correct figure for both cases is 302, as the defendants offered to prove. (See Appendix I to appellants' main brief.)

APPELLEES' SEEMING ATTEMPT TO BLAME APPELLANTS FOR
PROCEEDINGS BELOW ON INADEQUATE RECORD

At page 5, the appellees assert that the stipulation of submission (R. 408 (a)) "was entered into at the special instance and request of the appellants for the purpose of submitting the cause on the merits so as to obtain a final judicial determination of the issues involved and thereby avoid thousands of individual hearings which would be impractical and would tie up the District Court for years in litigation." With reference to this assertion, which is not supported by the record, the Court is respectfully referred to the matters set forth in Exhibit A, pp. 14-17, *infra*.¹ As shown by that exhibit certain language in a proposed stipulation, first submitted by counsel for appellees, was found objectionable by the appellants and appellees were thereupon offered their choice between (1) language in lieu thereof similar to that of the actual stipulation; (2) unconditional submission on the merits; or (3) no stipulation at all. The obviously intended suggestion of the above quoted language from appellees' brief, i. e., that the appellants were the moving parties in the matter, is thus clearly refuted.

Moreover, it was (and is) the view of the appellants that the plaintiffs had not made out, and could not

¹ None of the matters set forth in the Appendix to this brief, *infra*, is contained in the record in this case. Each is included as an Exhibit to this brief in refutation of some unsupported assertion on behalf of the appellees which we feel should not go unanswered. In view of the statements made on behalf of the appellees (at p. 14) concerning the honesty of counsel for appellants, certified, photostatic copies of all matters set forth in the Appendix, *infra*, will be lodged with the Clerk.

establish, a sufficient case for relief merely by showing the so-called general conditions under which the renunciations occurred without producing satisfactory evidence that such conditions actually caused them individually to renounce their citizenship. Obviously, if the District Court should disagree and be sustained in a holding to the effect that the "general conditions" were enough to vitiate the renunciations, much time and money would have been saved by the stipulation, but, if individual trials were to be held, the defendants wished to be in the same position to meet plaintiffs' evidence as if no stipulation had been entered, and this was one of the chief reasons for objecting to the language proposed by the plaintiffs (Ibid). The affidavit of plaintiffs' counsel (R. 445) to the effect that he had been informed by a former attorney for the defendants, just prior to October 10, 1947, the date of the stipulation, "that the defendants had no further evidence whatever to introduce in the cause against plaintiffs, or any of them, other than that already filed in documentary form therein" is, we submit, conclusively refuted by the affidavit of Mr. Thomas M. Cooley, II, which appears in Appendix B to appellants' main brief.

The suggestion at p. 7 that up to September 20, 1948, "the Justice Department attorneys contemplated that they would treat a final District Court decision of the causes as being dispositive of the rights of all citizens who had renounced because the suits were representative class suits" (pp. 7-8) is, we think, sufficiently answered by the fact that a number of them are also parties to *Barber v. Abo*,

No. 12195 herein, in which an appeal already had been noted on September 8, 1947 (see R. 198 in that case), and by the further fact that the appeal in the case of *Clark v. Inouye*, No. 11839 herein, was noted on December 10, 1947 (see R. 371 in that case). See, also, pp. 27-29 of appellants' main brief herein. The inference, that the appellees would seem to have the Court draw from their statement (p. 8) that "*By September 27, 1948, the last joinder of parties plaintiff had been made by agreement between the parties*" (italics supplied), to the effect that this had something to do with the defendants' alleged changing of their minds about treating the decision of the District Court as final, amounts to nothing more than reliance upon a half truth to support an erroneous conclusion. The actual fact is that the last such stipulation had been filed much earlier, i. e., on May 28, 1948 (see R. 499 *et seq.* See, also, Exhibit B, *infra*, and p. 25 of appellants' main brief). Presumably plaintiffs' counsel herein was aware of the decision of the District Court in *Inouye v. Clark*, 73 F. Supp. 1000, and if he was unaware of the appeal then pending therein, the fault was his own.²

² If appellees' conclusion that some change of the Government's position occurred in September 1948, is based upon the fact that the appeal in *Acheson v. Murakami*, No. 12082 herein, was noted on October 1, 1948 (see R. 54 in that case), they overlook the fact that each of the plaintiffs in the latter case was also a party to the *Inouye* case, *supra*, and that each of the questions presented by the *Murakami* case was also presented by the *Inouye* case, although the Court found it unnecessary to reach them in its decision (175 F. 2d 740).

The statement (at p. 8) that "counsel for the plaintiffs, pursuant to an oral agreement with the attorneys for the Justice Department, refrained from entering an interlocutory decree simply to enable that Department to examine its files relating to each renunciant to ascertain whether it intended to file any such designation and to prepare it in the event that it decided so to do" is again only half true. As shown by Exhibit B, pp. 17-23, *infra*, plaintiffs' offer was made not only orally but in writing and the response thereto shows that the offer was not accepted. Moreover, the fact that the defendants did not consider either that they had any such agreement with plaintiffs, or that the withholding of the interlocutory decree had the effect of extending their time is conclusively shown, we submit, by the fact that they obtained all necessary extensions of time by court orders (see R. 499, 500, 501). Moreover, after receipt of the Department's letter of June 23, 1948 (Exhibit B, *infra*), it is most difficult to understand how the plaintiffs could have been under any misapprehension as to the defendants' attitude with regard to the cases.

The charge (at p. 9) that on January 25, 1949, the defendants were in position to file the designation that they actually did file on February 25, 1949, is largely answered, we believe, by Appendices B and C to appellants' main brief which show that defendants had not been able to complete the work required on such designation by the latter date. However, Exhibit C, p. 23, *infra*, makes it clear that appellees' charge in this connection is untrue.

THE CHARGE THAT CERTAIN DEFENDANTS "WERE OPPOSED
TO CONTESTING THE SUITS"

At p. 11, the appellees comment upon the fact that the answer herein was limited to defendants *Clark*, *Hennessy* and *Wixon* (see R. 127) and state that the "reason why [counsel for defendants] did not file specific answers for the other defendants is simply that the Justice Department lawyers, after conferences with the other defendants, were informed that the Secretaries of the Interior and State Departments and the other defendants were opposed to contesting the suits." Here, again, is a half truth. Exhibit D, p. 25, *infra*, clearly shows that the Secretary of the Interior believed that he and other Interior Department defendants were not proper parties to the suits because they were not parties to the controversy then involved herein. It may be literally true that he was for that reason, "opposed to contesting the suits" but a truer statement of the fact is that he did not want to be in them at all. Certainly it cannot be inferred that he wished to confess judgment.

If contrary to our supposition the appellees, by the above-quoted statement, merely desire to advise the Court that certain of the defendants did not wish to be parties to the suits, it is clear, we submit, from the authorities cited on pages 72-75 of our main brief, that the matter of consenting to become parties to the suits was personal to them and that nothing done by Government counsel without their consent could make them parties to litigation pending in a District where they could not be personally served.

THE CHARGE THAT GOVERNMENT COUNSEL FALSELY SEEK TO
MISLEAD THE COURT

Appellees devote pages 13-14 to a discussion of the footnote which appears on pp. 80-81 of appellants' main brief. The chief point of that footnote is, of course, to emphasize the total lack in the present record of any evidence tending to prove that all or any individual plaintiff renounced his citizenship involuntarily. A further purpose was to demonstrate the possibility that without such evidence, some persons named as plaintiffs may even have been joined in the action inadvertently without their consent who might not desire to have their renunciations set aside; in other words, a practical *reductio ad absurdum* of the contention that such evidence is unnecessary. It is true that the pleadings (at R. 118, 134) establish for the purpose of this case that each of the original plaintiffs had attempted to revoke his renunciation, and that fact was overlooked in preparing the footnote, which we regret. However, fewer than half of the present plaintiffs were parties at that time (see p. 25 of appellants' main brief) and, moreover, the footnote is not thereby seriously impaired because the subsequent attempts by some of the plaintiffs to revoke their renunciations is at least as consistent with the thesis that they had a change of heart as it is that they did not wish to renounce in the first place (see *Id.* pp. 51-52). We did not intend to imply, nor do we think the footnote susceptible of being interpreted as stating, that most of the plaintiffs did not authorize the suits or desire the relief prayed therein. However, notwithstanding counsel's indignation (which we do

not understand in view of Exhibit B, *infra*), and the assurances that he gives concerning his recollection and belief concerning requests received from and interviews had with them (since his investigations and recollection have been shown to be faulty in other connections), we see no occasion further to modify the footnote or to ask the Court to disregard it.

Appellees' statements on p. 14 concerning the honesty and integrity of Government counsel seem to us to go beyond limits of propriety in any event, and indicate a rash disposition to jump to conclusions without checking the facts, which should be significant in other connections as well. The appellants' main brief at two places (pp. 30-31, 80) specifically stated that the dismissals in question would be contained in a supplemental record. When the Court inspects that record it will find an additional dismissal on the part of *Yoshiko Yokoi* whose case in the Southern District is mentioned in the footnote in question (at p. 81), which was filed after the preparation of appellants' main brief, and which therefore was not noted therein.

Supplementing the information given in the footnote in question (at p. 80) concerning the case of *Yukiko Nakanishi v. Acheson*, No. 8652-WN, the Court is advised that on March 14, 1950, the District Court for the Southern District of California entered a judgment therein declaring that the plaintiff continued to be a citizen of the United States notwithstanding her renunciation. This judgment was entered pursuant to the procedures described at pp. 7-11 of appellants' main brief. The plaintiff in that

case had been permitted to return from Japan on a certificate of identity pursuant to 8 U. S. C. § 903, upon representations to and findings of the District Court that her testimony was necessary therein. Her dismissal filed in the present cause is therefore especially significant.

THE APPELLEES' STATEMENT OF THE CASE

The factual statements set forth in appellees' brief from pages 15-103, are to some extent covered in the specification of errors relating to the findings of fact of the District Court set forth on pages 34-53 of appellants' brief. We submit that it is significant that the appellees have not attempted to support the individual findings of fact by record references or otherwise.

Since it is manifestly impossible to reply in detail to the appellees' factual contentions³ and since, in its opinion in the *Murakami* case, the Court cited with approval the book "The Spoilage" and quoted extensively from it, we are content to rely upon the *factual* statements therein as appellants' reply to the factual contentions contained in the appellees' brief to the extent that such contentions have not already been covered by the appellants' briefs. Obviously that book was not written with any bias against the segregates at Tule Lake who renounced their citizen-

³ In view of the numerous inaccuracies, exaggerations and assertions *dehors* the record contained in appellees' statement (pp. 15-103) and since the choice of some for comment would necessarily imply that they were more serious or objectionable than others, we deem it inadvisable to discuss any of them in this reply brief.

ship and, contrary to the appellees' representation (p. 6) it was filed in this case by the plaintiffs and not by the defendants (see Exhibit E, p. 26, *infra*).

**APPELLEES' CONTENTIONS THAT THE KOREMATSU CASE WAS
WRONGLY DECIDED AND THAT THEY WERE WRONGFULLY
IMPRISONED AT TULE LAKE**

Pages 15 to 41 of the appellees' brief appear to be devoted primarily to an effort to persuade this Court that the Supreme Court of the United States was in error in its decision in the case of *Korematsu v. United States*, 323 U. S. 214. As the Court will see from the prevailing and dissenting opinions in that case it was thoroughly considered by the Court and appellees' statements and arguments obviously add nothing of value which might have produced a different decision.

If the Court adheres to the line of reasoning that it pursued in its decision of the case of *Acheson v. Murakami*, 176 F. 2d 953, to which the Government has acceded, it is obviously unimportant whether the Supreme Court was right or wrong in its decision in the *Korematsu* case. However, as we have pointed out, the plaintiffs in the present litigation could prevail under the authority of that decision only if they introduced evidence tending to prove that the coercive factors recognized in the *Murakami* case actually operated upon them individually and caused them to renounce their citizenship through fear of real or supposed consequences if they failed to take that action. Accordingly, in view of their complete failure to make any such showing, they must rely upon different theories; one of which is that, in effect, they

were unlawfully imprisoned at the times of their renunciations. (See Appellees' brief, pp. 104 *et seq.*)

As previously pointed out, the vast majority of decisions to renounce appear to have been made by the evacuees after they knew that they were free to leave the center (see, e. g., Appellants' brief, pp. 18-19, 38-39). Moreover, prisoners in penitentiaries and jails throughout the land were free to renounce under the statute if they wished to do so and, we suggest, it is most doubtful that any such renunciant could obtain judicial relief from the consequences of his act merely by showing that, for some reason, his imprisonment was unlawful. He would have to show, we believe, some actual causal connection between the imprisonment and his individual act of renunciation, not merely that it *might* have had some influence on his decision. These considerations, we submit, make it unnecessary for the Court to pass upon the question of the lawfulness of plaintiff's segregation at Tule Lake in the present cases.

If, however, the Court feels that it must go into the question of the legality of the segregation program, attention is invited to the defendants' offer to prove that more than a thousand of those who renounced at Tule Lake actually went to Japan voluntarily after cessation of hostilities; that, of the others, all but 385 had applied for repatriation or expatriation to Japan prior to their renunciations, and, that, of those who had not so applied, all but 115 had been segregated because of their unwillingness to give affirmative answers to the loyalty question. Of the remainder, 66 appear to have gone to Tule Lake voluntarily as

family members and only 23 were required to go on other grounds (see Appendix "I" to appellants' brief). In other words, the vast majority of the present plaintiffs had given evidence of loyalty to Japan which, as the Supreme Court in the *Korematsu* case seemed to feel, indicated that the military orders of evacuation had not been shown by later events to have been unreasonable. In that case the Court said (p. 219):

That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately 5,000 American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

As the Court will recall, it was the supposed presence of disloyal persons among citizens and residents of Japanese ancestry, who might be dangerous to the war effort and whose identity could not readily be detected, that led the Supreme Court to hold the exclusion orders valid. Whether the Supreme Court was right or wrong in supposing that requests for expatriation and refusals to swear unqualified allegiance, in the circumstances, constituted sufficient confirmation of the actual presence of persons in the group (whose supposed presence justified the military orders excluding the entire group) it is difficult to see how their segregation from the other members of the group and subsequent detention could be held to be unlawful without overruling the reasoning of the

Korematsu case. Particularly so, since the present record does not establish that the plaintiffs were individually loyal to the United States, and certainly nothing therein would warrant the conclusion that *no* refusal to swear allegiance and *no* request for repatriation was prompted by loyalty to Japan.

OTHER LEGAL ARGUMENTS ADVANCED BY APPELLEES

The additional contentions advanced by the appellees at pages 104-128 appear either to have been answered by appellants' brief or too transparent to require answer. For example, the contention (p. 124) that the renunciation hearings constituted "Star Chamber" proceedings because not publicly conducted is a puny argument compared to that which would have been made if public hearings had been held and the pro-Japanese organizations thereby afforded an opportunity to learn of the statements made by the applicants being interviewed.

CONCLUSION

For the reasons stated in the appellants' opening brief herein, the judgment should be reversed.

H. G. MORISON,

Assistant Attorney General,

FRANK J. HENNESSY,

United States Attorney,

ROBERT B. McMILLAN,

Assistant United States Attorney,

ENOCH E. ELLISON,

PAUL J. GRUMBLY,

Attorneys, Department of Justice,

Attorney for Appellants.

APPENDIX

EXHIBIT A

(1)

SEPTEMBER 26, 1947.

Air Mail

Re: Tule Lake Cases, Nos. 25294-5; Your File
PF:EEE 93-1-1320.

The ATTORNEY GENERAL,
Washington, D. C.

(Attention: Peyton Ford, Assistant Attorney
General, and Charles Rothstein and E. E.
Ellison, Alien Enemy Control Unit.)

SIR: Concerning those two equity suits, you will
please find enclosed copy of proposed stipulation,
prepared and submitted today by Mr. Wayne N.
Collins, for your consideration and approval before
it is signed by us.

Mr. Collins told us that he had lately discussed
the matter over the telephone with Mr. Ellison, who
suggested it would be well to take it up with us.
We see no objection; especially since it would prob-
ably facilitate an earlier decision by Judge Goodman
than as matters now stand before him.

Please wire me whether or not it is all right for
us to sign the stipulation just as it is.

Respectfully,

FRANK J. HENNESSY,
United States Attorney.

Encl.

In the Southern Division of the United States District
Court for the Northern District of California

No. 25294-G; No. 25295-G; Cons. No. 25294-G

TADAYASU ABO, ET AL., ETC., PLAINTIFFS, v. TOM CLARK,
ETC., ET AL., DEFENDANTS

STIPULATION

It is stipulated between the parties hereto that this case be submitted to the Court on the cause, that is, on the merits and the record as it stands, including any evidence submitted on the respective motions for summary judgment and for judgment on the pleadings that is admissible as evidence, on the understanding that if the Court is unable, on said evidence, to decide the factual issues of duress, coercion, menace, intimidation, undue influence, fraud or mistake of law or fact as causing the renunciation of any plaintiff that a hearing on such issues of fact as to any such plaintiff be ordered or that additional affidavits of merit on such factual issues as to any such plaintiff be ordered filed by the parties hereto in lieu of any such hearing.

WAYNE M. COLLINS,
Attorney for Plaintiffs.

TOM C. CLARK,
Attorney General,

FRANK J. HENNESSY,
U. S. Attorney,

By: _____
Assistant U. S. Attorney.
Attorneys for Defendants.

Dated: SEPTEMBER —, 1947.

PF: EEE: yrrj

D. J. File 93-1-1320

WASHINGTON, D. C., *October 2, 1947.*

FRANK J. HENNESSY, ESQ.

*United States Attorney,**San Francisco, California.*

Attention Mr. McMillan. Reurlet Tule Lake Cases 25294 and five. We are unable to agree to stipulation submitted by Collins. Suggest stipulation to effect that case be submitted on present record including affidavits and exhibits to extent that same are competent, relevant and material, and that parties close proofs for all purposes with provision that district court may, in its discretion, order production of any further or additional evidence it deems necessary for proper decision of any issue, in which event the parties shall have the same rights in respect of introduction of evidence as to cases of plaintiffs affected by order that they would have had if they had not entered into stipulation. Advise.

PEYTON FORD,

Assistant Attorney General.

 [Telegram]

DEPARTMENT OF JUSTICE,

WF *San Francisco, Calif., Oct. 3.*

The ATTORNEY GENERAL,

Alien Enemy Control Union Unit.

Attention Peyton Ford, Assistant Attorney General. Reurtel yesterday Tule Lake Japanese equity cases 25294 and 5. Unable to distinguish difference in effect between Collins proposed stipulation and stipulation suggested in your wire. Advise.

917A OCT. 4.

25294 5.

HENNESSY.

PF: EEE: YRJ

File 93-1-1320

WASHINGTON, D. C., Oct. 6, 1947.

FRANK J. HENNESSY, Esq.,

*United States Attorney,**San Francisco, Calif.*

Attention Mr. McMillan. Reurtel October 3, Tule Lake Cases 25294 and 5. Change in stipulation removes possible ambiguities, broadens courts discretion to include all issues and avoids agreement now that possible new proofs be made by affidavit. If Collins won't sign suggest you stipulate unconditional submission on merits or not at all.

FORD,

Assistant Attorney General.

EXHIBIT B

WAYNE M. COLLINS,

ATTORNEY AT LAW,

San Francisco 4, Calif., June 8, 1948.

In re: *Abo v. Clark*, No. 25294-G; *Furuya v. Clark*, No. 25295-G; USDC, San Francisco.

Honorable TOM C. CLARK,

*Attorney General of the U. S.,**Department of Justice, Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: It is likely that your office has directed your attention to the fact that on April 29, 1948, U. S. District Judge Louis E. Goodman handed down his written Opinion in the Nisei renunciation cases ordering the plaintiffs' renunciations of U. S. nationality set aside and their citizenship restored.

That Opinion excludes from recovery of nationality those among the first 60 renunciants who were re-

moved to Japan and there committed specific acts of expatriation under 8 U. S. C. A., sec. 801. It reserves to you the right, for 90 days, to designate any of the plaintiffs against whom you may wish to present additional evidence through the medium of special hearings. The burden of proof in any such designated cases, however, is laid upon the Government to demonstrate the renunciations of any such designated persons were not affected by the duress in which they were held but were wholly voluntary upon their part. I believe you will agree that it is an impossible burden for the Government to sustain and that the judgment could not be reversed either on questions of fact or of law.

It has been reported that a total of 5,371 Nisei renounced their citizenship as a result of the duress in which they were held. In excess of 3,000 of them are plaintiffs in the aforesaid suits. Approximately 1,000 requests have reached me from other renunciants seeking to be included therein and it is likely that substantially all renunciants not now in the case, with few exceptions, in due course will request inclusion. Each mail brings in like requests. A great number of these requests are from young men and women who, heretofore, for diverse reasons, were fearful of joining suits which they had been informed were brought against the Government and which, therefore, might place them in danger. The fear was real to them. Only time will allay the fears of a number of them when the nightmare of their long imprisonment has faded away.

The consolidated class suits in equity were brought, as recited in the pleadings, for the benefit of the named plaintiffs, those who thereafter might be joined therein by name and also for the benefit of all similarly situated renunciants. It would seem, therefore,

that it would be for the best interest of the courts and of counsel, as well as for the parties, that all Nisei renunciants not already protected by suit be included in the mass action by consent. In this manner all the affected persons would receive the minimum legal benefit that is their due. I believe you will agree that they are entitled to that measure of protection, especially in view of the fact the government was responsible for their plight.

In consequence, to save the time and expense of the parties and the time and work that otherwise would fall upon your Department and upon the courts I suggest that a list of the names of the renunciants not yet protected by suit be supplied for inclusion in the mass actions. I am willing to bear the expense of preparation of such a list. To supply such a list of names would not violate any rule of law or regulation of your Department. The name of a renunciant is not a matter of a private or confidential nature any more than is the name of a person who becomes a citizen by a naturalization judgment. On the contrary, such names are matters of public record and interest.

If you will authorize your office to supply me with such a list at my expense those persons will be joined in the pending suit to receive the initial minimum legal protection of their fundamental rights. Thereafter I shall refrain from having an interlocutory degree entered in the consolidated cases until your office has had ample opportunity to review the files of all the plaintiffs and to designate any among them against whom it might decide to present additional evidence. Thereafter, any of those so designated for special hearing would have the opportunity to be represented by such attorneys as they might select to represent them at their special hearings.

moved to Japan and there committed specific acts of expatriation under 8 U. S. C. A., sec. 801. It reserves to you the right, for 90 days, to designate any of the plaintiffs against whom you may wish to present additional evidence through the medium of special hearings. The burden of proof in any such designated cases, however, is laid upon the Government to demonstrate the renunciations of any such designated persons were not affected by the duress in which they were held but were wholly voluntary upon their part. I believe you will agree that it is an impossible burden for the Government to sustain and that the judgment could not be reversed either on questions of fact or of law.

It has been reported that a total of 5,371 Nisei renounced their citizenship as a result of the duress in which they were held. In excess of 3,000 of them are plaintiffs in the aforesaid suits. Approximately 1,000 requests have reached me from other renunciants seeking to be included therein and it is likely that substantially all renunciants not now in the case, with few exceptions, in due course will request inclusion. Each mail brings in like requests. A great number of these requests are from young men and women who, heretofore, for diverse reasons, were fearful of joining suits which they had been informed were brought against the Government and which, therefore, might place them in danger. The fear was real to them. Only time will allay the fears of a number of them when the nightmare of their long imprisonment has faded away.

The consolidated class suits in equity were brought, as recited in the pleadings, for the benefit of the named plaintiffs, those who thereafter might be joined therein by name and also for the benefit of all similarly situated renunciants. It would seem, therefore,

that it would be for the best interest of the courts and of counsel, as well as for the parties, that all Nisei renunciants not already protected by suit be included in the mass action by consent. In this manner all the affected persons would receive the minimum legal benefit that is their due. I believe you will agree that they are entitled to that measure of protection, especially in view of the fact the government was responsible for their plight.

In consequence, to save the time and expense of the parties and the time and work that otherwise would fall upon your Department and upon the courts I suggest that a list of the names of the renunciants not yet protected by suit be supplied for inclusion in the mass actions. I am willing to bear the expense of preparation of such a list. To supply such a list of names would not violate any rule of law or regulation of your Department. The name of a renunciant is not a matter of a private or confidential nature any more than is the name of a person who becomes a citizen by a naturalization judgment. On the contrary, such names are matters of public record and interest.

If you will authorize your office to supply me with such a list at my expense those persons will be joined in the pending suit to receive the initial minimum legal protection of their fundamental rights. Thereafter I shall refrain from having an interlocutory degree entered in the consolidated cases until your office has had ample opportunity to review the files of all the plaintiffs and to designate any among them against whom it might decide to present additional evidence. Thereafter, any of those so designated for special hearing would have the opportunity to be represented by such attorneys as they might select to represent them at their special hearings.

If the foregoing proposal does not meet with your approval or consent and you decide to oppose the inclusion of additional parties plaintiff in the pending consolidated cases I solicit your consent to their inclusion in a new mass class action to be brought in the same court upon identical grounds for the protection of those who have asked my aid and for those who yet may do so. In such an event I request your consent and a stipulation that the record in such a case may be identical, except for names, with the record in Action No. 25294, now pending, or that said record be incorporated in the new case by reference or through the medium of copies. Submission of the cause for decision by the court can be deferred for a reasonable period of time, to be mutually agreed upon, for the purpose of enabling your office to designate such of the plaintiffs therein against whom you might wish to present additional evidence and designate for special individual hearings in like manner as has occurred in Action No. 25294, now pending.

I would be grateful were you to favor me with a prompt reply to these proposals.

Very truly yours,

/s/ W. M. COLLINS.

Copy to: H. Graham Morrison, Esq., Peyton Ford, Esq., Enoch Ellison, Esq.

JUNE 23, 1948.

Re: Abo v. Clark, No. 25294-G; Furuya v. Clark,
No. 25295-G, District Court of the United States
for the Northern District of California, Southern
Division.

WAYNE M. COLLINS, ESQUIRE,
Attorney at Law,
San Francisco 4, California.

DEAR MR. COLLINS: Your letter of June 8, 1948,
relative to the above-entitled cases, addressed to
the Attorney General of the United States, has
been referred to me for reply.

You first request the Department of Justice to
supply you with a list of the names of persons
of Japanese ancestry who renounced their Ameri-
can citizenship and who, as of June 8, 1948, had
not instituted a suit in order to recover their
citizenship. You suggest that if such a list of
names were forwarded to you such persons could
be included in the above-entitled cases and thereby
become subject to the terms of the interlocutory
decree entered by Judge Goodman on April 29,
1948.

It is the view of this Department that the names
of prospective litigants should not be furnished to
private counsel. This policy has been consistently
followed and I am authorized to say, we see no
sufficient justification for departing from it in this
instance. Moreover, the Department would be unable
to consent to the addition of plaintiffs to the existing
cases in any event, for the reason that such addition
would greatly complicate and delay the investigations
now in progress as a consequence of the interlocutory
decision; would make future proceedings in the cases
much more complex and burdensome; and would

correspondingly delay the final disposition of this matter.

By your letter of June 8, 1948, you suggested, that in the event the Department is unable to agree to the addition of parties plaintiff to the instant cases, they should be included in a new joint action to be brought and submitted to the Court upon identical grounds and the record made in the instant cases, and be disposed of in a similar manner. The bringing of a new joint action is, of course, a matter for your judgment. However, it is the view of this office that the decision of Judge Goodman makes it necessary to ascertain the particular circumstances surrounding the act of renunciation of each *individual* plaintiff in order to determine whether the act of renunciation was voluntary or involuntary. If this is correct, it appears that there is no common question of fact affecting the several rights of persons who seek cancellation of their renunciation of citizenship and it is doubtful therefore, whether or not a joint action properly lies in this instance.

Moreover, it is the present view of this Department that, until there has been a final determination of the cases presently pending in the District Court, it is not in a position to agree to enter into any stipulation with respect to venue, cause of action or record evidence in any new case that you may decide to file. It is probable that, if you file such a new action, a stipulation could be entered holding it in status quo until the cases presently pending are finally disposed of. It would appear that such a course of action would adequately protect the interests of the parties to the new action and would not in any way prejudice the pending cases. Presumably the final decision in the pending cases would dictate the

course of action to be followed in disposing of any case hereafter filed.

I trust that this reply adequately answers your inquiries of June 8, and clearly conveys to you the position of this Department concerning the disposition of the renunciation cases.

Sincerely yours, ~

H. G. MORISON,
Assistant Attorney General.
(For the Attorney General).

cc: Frank J. Hennessy, Esq., United States Attorney, San Francisco 1, California.

EXHIBIT C

yrj

JANUARY 19, 1949.

Re: Mary Kaname Furuya, et al., v. Tom Clark, etc., et al.; Tadayasu Abo, et al., etc. v. Tom C. Clark, etc., et al.

PAUL J. GRUMBLY, Esquire

c/o FRANK J. HENNESSY, Esq.

*United States Attorney, San Francisco,
California*

DEAR MR. GRUMBLY: Enclosed are the preliminary designations of plaintiffs in the above cases as to whom it is desired to introduce additional evidence. After you departed it was found that it was impossible to complete the preliminary designations in the time available and accordingly a separate classification has been added in each case tentatively designating plaintiffs because the investigations of the evidence available as to them have not yet been sufficiently completed. It is hoped that it will not be necessary to file these preliminary designations and that the Court will give ample time for the completion of the survey

and submission of the amendatory pleadings mentioned in the enclosed papers.

Enclosed also is a mimeograph compilation of the various opinions in the case of *Ismael Acosta-Hernandez*, most of which have been printed in the Appellees' brief in the *Inouye* case. You will note that the Appellees have omitted the opinion and ruling of the Commissioner, which was reinstated by the decision of the Attorney General and upon which he presumably placed reliance. In the event that it is determined that a reply brief on behalf of Appellant should not be filed, or if that determination has not been made at the time of argument, it is believed that the compilation should be submitted to the Court for its information and with the explanation that the Commissioner's opinion is essential to an understanding of the decision reached by the Attorney General.

Prior to the argument in the *Inouye* case, we will prepare and send you our suggestions with reference to the arguments which have been advanced in the brief for the Appellee. You will, of course, make use of such suggestions as seem appropriate at the time of argument.

We wish you the best of luck in your argument in the *Inouye* case and in your negotiations with reference to the above cases.

Sincerely,

H. G. MORISON,
Assistant Attorney General.

P.S. Enclosed also is a letter from Miss Dembitz listing changes that she wishes to have made in the Appellees' brief in the *Inouye* case.

Enclosure No. 469345.

EXHIBIT D

THE SECRETARY OF THE INTERIOR,

Washington 25, D. C., November 30, 1945.

MY DEAR ATTORNEY GENERAL: We have learned that four suits have been filed against the Government in the District Court for the Northern District of California on behalf of approximately 1,000 persons of Japanese ancestry in the Tule Lake Segregation Center who have renounced their American citizenship under the Act of July 1, 1944 (8 U. S. C. A. 801 (i)). Two of these suits, Nos. 25296R and 25297G, are petitions for a writ of habeas corpus. The other two, Nos. 25294S and 25295R, are equity suits for a declaratory judgment to determine nationality and an injunction to restrain further detention and deportation. We have not yet received copies of the complaints, but I understand that in the two equity suits the Secretary of the Interior, the Director of the War Relocation Authority, the Assistant Director of the War Relocation Authority in San Francisco, and the Tule Lake Project Director are named as defendants. According to our information, the cases have been consolidated for hearing on December 10.

The detention of the petitioners in these suits has been ordered and is being enforced by the Department of Justice and the administration of the renunciation law and the determination of deportation policy are the responsibility of the Department of Justice. It is therefore suggested that the United States Attorney be instructed to move to dismiss the suits with respect to all officials of the Department of the Interior who may be named as defendants.

Sincerely yours,

(Signed) HAROLD L. ICKES,
Secretary of the Interior.

THE HONORABLE, THE ATTORNEY GENERAL.

EXHIBIT E

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY,
NORTHERN DISTRICT OF CALIFORNIA,
San Francisco (1), February 4, 1947.

Air Mail

Re: Tule Lake Japanese equity suits and habeas corpus proceedings, Nos. 25294-5-6-7; Your File 93-1-1292.

THE ATTORNEY GENERAL,
War and Claims Division,
Department of Justice, Washington, D. C.
(Attention: Messrs. John F. Sonnett, Assistant Attorney General, and Thomas M. Cooley II, Special Assistant Attorney General and Director of Alien Enemy Litigation Section.)

Sir: Since Wayne R. Collins, attorney for the plaintiffs and petitioners, filed a copy of "The Spoilage" just recently, it would probably be needless for us to file the copy which came with your letter of February 21, 1947. If so, may we hold it here for a week or so before returning it to you? Mr. McMillan thinks he should read it, although, obviously, a stupendous task.

Respectfully,

FRANK J. HENNESSY,
United States Attorney,
By (S) W. E. Licking,
W. E. LICKING,
Assistant United States Attorney.

No. 12251

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF
THE UNITED STATES, *et al.*,

Appellants,

vs.

TADAYASU ABO, *et al.*,

Appellees.

BRIEF FOR APPELLEE TETSUO FRANK KAWAKAMI.

A. L. WIRIN,
FRED OKRAND,

257 South Spring Street, Los Angeles 12.

Attorneys for Appellee Tetsuo Frank Kawakami.

FILED

MAY 1 - 1950



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No. 12251

IN THE

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Appellants,

vs.

TADAYASU ABO, *et al.*,

Appellees.

BRIEF FOR APPELLEE TETSUO FRANK KAWAKAMI.

Facts Concerning Appellee Tetsuo Frank Kawakami.

Tetsuo Frank Kawakami was born in the United States in 1924. While at the Tule Lake Relocation Center, and in November 1944, while over 18 but under 21, the appellee renounced his citizenship. He claims that his renunciation was not his free and voluntary act but was the result of undue influence, mistake, misunderstanding and coercion. Following his renunciation he went to Japan.

In Japan he sought to return to the United States as a citizen of the United States and applied for a passport at the United States Consulate at Yokohama, Japan, in October 1946. In October 1947 the United States Consul

rejected his application for a passport on the ground he lost his United States citizenship by virtue of his renunciation at the Tule Lake Center.

In May 1948 appellee filed a complaint under Section 503 of the United States Nationality Act in the United States District Court for the Southern District of California, No. 8238-W. Thereafter, and on June 17, 1949, the Secretary of State, defendant in that proceeding, filed a motion to dismiss the complaint; and on October 4, 1949, upon stipulation of the parties said cause of action was dismissed on the ground that the rights of the appellee had been fully adjudicated in the judgment entered by the court below, in *Abo v. Clark*, United States District Court, Northern District of California, No. 25294-G, from which judgment the appellants in the instant appeal have taken their appeal.

The foregoing recital of facts cannot, and it is believed, will not, be disputed by appellants. See affidavit of A. L. Wirin filed concurrently herewith and see Appellants' Brief, page 80, note. For the convenience of this Court there are attached as exhibits hereto and marked respectively, Appendix A, B, and C, the following papers of the proceeding in the District Court for the Southern District of California: (A) the defendant's motion to dismiss the complaint, (B) the stipulation for dismissal, and (C) the order of dismissal.

ARGUMENT.

I.

The Renunciation Statute (8 U. S. C. 801(i)), in Purpose and Effect, Is Unconstitutional, Being in Violation of the United Nations Charter Because It Is Racially Discriminatory.

As pointed out below under Point II, and as conceded by appellants (App. Br. 17)¹ and as the record in this case makes it clear [R. 157-160], the enactment of 8 U. S. C. 801(i) was brought about specifically and for no other purpose than to apply to persons of Japanese ancestry. It was not intended to apply nor has it been applied to any persons other than Japanese. As such, the statute, being directed solely against persons of Japanese ancestry, is in direct and complete disaccord with the United Nations Charter to which the United States is a party and which provides for "respect for human rights and for fundamental freedoms without distinction as to race, sex, language, or religion" (59 Stat. 1035ff.; U. S. Code Cong. Service, 79th Congress, 1945, p. 964).

In the case of *Fujii v. State of California*, No. 17309 in the District Court of Appeal of the State of California, Second Appellate District, decided April 24, 1950 (not yet reported), the California Alien Land Law was held invalid. The point is made clear by the Court that legislation directed against a particular class of people solely because of their race cannot be sustained in view of our obligations under the United Nations Charter even though the statute on its face appears innocuous and does not in terms refer to race. Said the Court:

¹Appellants' Brief will be referred to as: (App. Br. 1 etc.).

“Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would want and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well. This nation can be true to its pledge to the other signatories to the Charter only by cooperating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes. . . .

“Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, *but which ultimately and actually are referable to race or color*, must be and are therefore declared untenable and unenforceable.” (Italics added.)²

Thus it is clear that the Renunciation Statute whose purpose and intent was directed solely against the Japanese and which statute has been used only against the Japanese, is invalid for the same reasons which prompted the California Court to declare the Alien Land Law invalid.

²For the convenience of the Court and Counsel, there is being lodged with the Clerk of this Court copies of the *Fujii* opinion referred to above. Copies are also being furnished to counsel for appellants.

II.

All Renunciations at Tule Lake Made Under the Undenied Circumstances There Extant Are the Result of Coercion and Are, Therefore, Invalid.

This Court said the following in *Acheson v. Murakami*, 176 F. 2d 953, 954:

“Since the records of this court show the government is contesting some four thousand similar cases of deportees who are seeking identical relief, we are giving consideration to these uncontested underlying facts, certain to have their effect upon the minds of the mass of deportees incarcerated at Tule Lake.”

This Court thus had the very case at bar in mind when it decided *Murakami*.

Accordingly it is submitted that this Court has already decided in the *Murakami* case that the events occurring at Tule Lake, in their totality, were of such magnitude that they themselves render nugatory any renunciations that there took place because renunciation under such circumstances could not be, and were not, free and voluntary.

This matter was briefed *in extenso* in the *Murakami* case, No. 12082 of this Court, and was presented in a consolidated brief along with the arguments in *Clark v. Inouye* (175 F. 2d 740), No. 11839 herein. Because the record on this point in the case at bar is identical for all practical purposes with that in *Murakami* and *Inouye*,³

³Appellants are in accord with appellee on this point. See Appellants' Brief, page 13, note 3.

the brief of appellees in these latter cases are referred to herewith and incorporated herein as though fully set forth. For the convenience of the court and counsel, pages 2-55 and 63-66 of the *Murakami* and *Inouye* Brief are attached hereto as Appendix D and constitute appellee's argument on this point.

III.

Appellee Has Now Been Denied a Right as a Citizen of the United States and, Regardless of Whether He Was so Denied a Right at the Time of Trial, Is Entitled to an Affirmance of the Lower Court's Judgment Because of the Intervening Events.

Assuming, *arguendo*, that were there no other facts in the picture as to appellee Kawakami, the principles of *Clark v. Inouye*, 175 F. 2d 740, would control, the situation before the Court now, consisting of facts which have occurred since the time of trial, make that decision inapplicable. As indicated in the statement of facts, above, and by the affidavit of A. L. Wirin presented to the Court concurrently herewith, appellee applied to the United States Consul in Yokohama, Japan, in October 1946, for a passport to return to this country. In October 1947, that passport was denied him on behalf of the then Secretary of State, the predecessor in office to appellant Acheson herein, on the ground that he had lost his citizenship by his Tule Lake renunciation. Thus was and is appellee denied a right as a national of the United States by appellant Acheson within the meaning of 8 U. S. C. 903 (*Ishikawa v. Acheson*, 85 Fed. Supp. 1 [D. C. D. Haw. 1949]).

Appellants have asked this Court to take notice of certain events which have intervened since the time of trial.

(See App. Br. 31, 62, 63, 80 and 81.) For example at page 63 of their brief appellants say:

“it seems plain that the duty would have devolved upon this court to inquire into the change in jurisdictional facts.”

We are in agreement with appellants as to this phase of the case and consider that such intervening facts, as to both parties, are properly acceptable by this Court.

It is not unusual that events take place subsequent to the time of trial, and, where material, the appellate court may be apprized of the facts, and may make an appropriate order because of their existence.

This Court has pointed out in its order dated February 20, 1948, in the case of *Williams v. Fanning*, No. 11317, that the rules of practice in this Court are the same as in the Supreme Court of the United States. This rule is embodied in Rule 9 of the Rules of this Court.

It has been the practice of the Supreme Court in an appropriate case to take notice of events intervening between a trial court's judgment and pending an appeal even though the non-existence of those events below affected the jurisdiction of the lower court or the appropriateness of the lower court's acts.

Thus, the Supreme Court said in *Watts, Watts & Co. v. Unione Austriaca Navigazione etc.*, 248 U. S. 9, 21:

“This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. . . . And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below.”

This same principle was announced in *Patterson v. Alabama*, 294 U. S. 600, 607:

“We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. . . .”

Even as recently as the current term has the Supreme Court taken notice of events occurring since the time of trial below. See *Parker v. County of Los Angeles*, 94 L. Ed. (Adv. Op.) 133.

That this Court has full authority to enter such an order to affirm the lower court's judgment is seen from *Camp v. Gress*, 250 U. S. 308, 318:

“In cases coming from Federal courts, the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error . . . requires.”

This same power is specifically given this Court by the Code, 28 U. S. C. 2106.

Therefore, especially since consideration of such facts will *sustain* the judgment of the lower court, should this Court consider and accept the intervening facts showing the deprivation of right to appellee. Thus considered, the jurisdiction and judgment of the lower court must be sustained irrespective of the validity of appellants' arguments concerning the applicability of the *Inouye* case (App. Br. 60-65) for certainly now has appellee been deprived by appellant Acheson of a right as a citizen of the United States.

IV.

**A Person Over 18 but Under 21 Cannot Renounce His
Citizenship Under 8 U. S. C. 801(i).**

This point was also involved in *Clark v. Inouye*, No. 12082 of this Court. In its decision therein, 175 F. 2d 740, the Court did not reach that point.

It is submitted that, regardless of any other arguments in the case, appellee Kawakami's purported renunciation was invalid because he was a minor under the age of 21.

Appellants' argument (App. Br. 83-97), viewed in its most favorable light, at best establishes but one thing; that there is perhaps an ambiguity in 8 U. S. C. 801 and 8 U. S. C. 803(b). Assuming, *arguendo*, that this is so, *Perkins v. Elg*, 307 U. S. 325, 337, directly controls the disposition of the case for it was there held that "rights of citizenship are not to be destroyed by an ambiguity." And *cf.* *Schneiderman v. United States*, 320 U. S. 118, 122, 125.

The action of Congress in quite clearly excepting from the provisions of 8 U. S. C. 803(b) all but subsections (b) to (g) *inclusive* of 8 U. S. C. 801 calls for the direct application of the maxim *expressio unius est exclusio alterius*.

No reported decision, other than that by the trial court in *Inouye*, 73 Fed. Supp. 1000, has been found on the precise point. However, the decision of the Board of Immigration Appeals in the case of *Ismael Acosta Her-*

nandez, No. 56196/251,⁴ is completely apposite. That decision held squarely that a boy 19 years old could not expatriate himself under the provisions of 8 U. S. C. 801(j) because he was not yet 21. The reasoning of that decision is equally applicable to subsection (i) as appellants themselves have recognized (App. Br. 95). For the convenience of this Court that decision is set out in full herein as Appendix E.⁵ Appellees submit that that decision is correct and should be applied by this Court in this case to subsection (i). *Cf. Attorney General v. Ricketts*, 165 F. 2d 193, 194 (C. C. A. 9, 1947).

Appellants' efforts to spell out some sort of a scheme that 18 years is *the* age of expatriation in the Nationality Act of 1940 (App. Br. 87) fall of their own weight. By pointing to the various sections wherein Congress did

⁴This is the decision referred to by appellants at page 95, note 41 in their brief. The entire opinion of then Attorney General Clark, in reversing the decision of the Board of Immigration Appeals, and in which he administratively legislated, is as follows:

"The decision and order of the Board of Immigration Appeals are reversed. I feel the Congress intended that the statute apply to persons under 21 who leave the United States for the purpose of evading or avoiding training and service in the land or naval forces. The view that the Congress failed to accomplish this purpose can, of course, be presented to the courts by the persons affected and I think under the circumstances a judicial determination of the question is desirable." (Decision of May 15, 1946.)

The instant case is an occasion for such a determination and to reject appellants' argument. Indeed the appellant McGrath's predecessor himself in the above opinion, in effect, suggests the rejection of his point of view.

⁵Attached to the decision of the Board of Immigration Appeals, and attached here as part of Appendix D, is a memorandum prepared by the Legal Adviser to the Department of State showing that the same reasoning is applicable to subdivision (a) of 8 U. S. C. 801. Appellants themselves argue that the same rule is applicable for subdivision (i) as for subdivision (a) (App. Br. 92).

make 18 years the age (App. Br. 87), and in one case gave certain rights up to 23 in view of *Perkins v. Elg* (App. Br. 91), they have emphasized that where Congress meant to change the common law rule of *Perkins v. Elg*, 307 U. S. 325, it specifically said so.

It is to be observed that the italicized portions of appellants' quotation from page 69 of *Codification of the Nationality Laws* (House Committee Print, 76th Cong., 1st Session) (App. Br. 88) is pure *dictum*, if one may so characterize a committee report. The report was speaking of *this subsection*, namely subsection (b) of 8 U. S. C. 803. That subsection is specifically limited to subsections "(b) to (g) *inclusive*" (italics added), of 8 U. S. C. 801. And so also must the quotation from page 67 of *Codification of the Nationality Code* (App. Br. 89) be read in its context, namely with reference to "this provision"—8 U. S. C. 803(b).

Similarly the excerpt from Sen. Rep. 2150, 76th Cong., 3rd Sess., p. 4 (App. Br. 89) speaks of "certain *specified* acts" of expatriation (italics added)—not *all* acts of expatriation.

In the light of the strong and positive holding of *Perkins v. Elg*, 302 U. S. 307, 337 that "rights of citizenship are not to be destroyed by an ambiguity," the weakness of appellants' argument becomes apparent. Witness these words in their effort to arrive at Congressional intent: "speculate": "possible"; "plausible" (App. Br. 90); "might have been deemed"; "might have obtained" (App. Br. 91); "speculations": "possible" (App. Br. 92); "may have had good reason"; "inferable" (App. Br. 93). It is submitted that the precious right of citizenship (see *Schneiderman v. United States*, 320 U. S. 118, 122, 125) cannot be so nonchalantly and conjecturally obliterated.

The Nationality Act in 1940 in which *for certain specific acts* the age of expatriation was made 18, having been passed subsequently to the decision of *Perkins v. Elg*, 302 U. S. 307 (1939), the conclusion is inescapable that Congress intended the rule of that decision to apply where it had not changed it. Certainly speculation and surmise cannot serve to change that general rule and result in loss of citizenship for Kawakami.

While administrative construction is entitled to great weight (App. Br. 96), where that construction is contrary to the terms of the statute, it will not be followed by the Court. (See *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446.)

And finally, it is clear that rather than fly in the face of what appellants have called the “manifest” Congressional intent (App. Br. 97), the situation that one can renounce if outside this country at the age of 18 but cannot do so if inside this country, is precisely what Congress intended. In the first place, Congress said so in 8 U. S. C. 803(b). In the second place, Congress was not unmindful of the existence of subsection (i). Thus at the same time it passed 8 U. S. C. 803(b) it also passed 8 U. S. C. 803(a). That latter subsection recognizes a distinction between 8 U. S. C. 801(f) for it there says that:

“Except as provided in subsections (g), (h), and (i) of section 401 (8 U. S. C. 801), no national can expatriate himself, or be expatriated, under this section *while within the United States* or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and *when the national thereafter takes up a residence abroad.*” (Italics added.)

Here then, is specific recognition by Congress of a distinction between expatriation while within and expatriation while without the United States. It is to be noted that all of the subsections of 8 U. S. C. 801 except subsections (g), (h), and (i) refer to acts outside the United States.

For this Court to give the construction contended for by appellants would be to re-write the statute. This the Court will not do. As the Supreme Court has said: "It is not for (the Courts) to add to the legislation what Congress pretermitted." (*United States v. Monia*, 317 U. S. 424, 430.)⁶

Conclusion.

The judgment of the Trial Court should therefor be affirmed.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

Attorneys for Appellee Tetsuo Frank Kawakami.

⁶And compare the action and language of the Michigan Supreme Court in *General Motors Corp. v. Michigan Unemp. Comp. Comm.*, 321 Mich. 724, 34 N. W. 2d 497, 498: "The Court is in duty bound to construe and sustain a legislative enactment as written if it is not violative of constitutional provisions. Whether this amendment to the statute is or is not unduly restrictive as to an employee obtaining unemployment compensation, is a matter for legislative determination."





APPENDIX A.

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In the United States District Court, in and for the
Southern District of California, Central Division.

Tetsuo Frank Kawakami and Isao James Kuromi,
Plaintiffs, v. Dean Acheson, as Secretary of State, De-
fendant. No. 8238-WM.

MOTION TO DISMISS COMPLAINT.

The defendant moves the Court as follows:

1. To dismiss the action as to the above named plain-
tiffs because the issues as to them have already been fully
adjudicated in another action between the same parties,
to-wit: In case No. 25294-G, Abo, *et al.* v. Clark, *et al.*

in the District Court of the United States in and for the Northern District of California.

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APPENDIX B.

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In the United States District Court, Southern District
of California, Central Division.

Tetsuo Frank Kawakami and Isao James Kuromi,
Plaintiffs, vs. Dean Acheson, as Secretary of State, De-
fendant. No. 8238-WM.

STIPULATION FOR DISMISSAL.

It Is Stipulated that the defendant's motion to dismiss
the complaint may be granted, and that the complaint may
be dismissed without prejudice.

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By ROBERT J. KELLEHER,
Robert J. Kelleher,

Attorneys for Defendant.

APPENDIX C.

ORDER OF DISMISSAL.

The above matter having come on for hearing upon the motion of the defendant to dismiss the complaint, and upon the stipulation that said complaint may be dismissed, it appearing to the court that as to the plaintiffs the issues herein have already been fully adjudicated in another action the same parties, to-wit: In case No. 25294-G, Abo, *et al.* v. Clark, *et al.*, in the District Court of the United States in and for the Northern District of California, and good cause appearing therefor.

It Is Ordered that the action herein be dismissed without prejudice.

Dated: This 4, day of October, 1949.

(S) WM. C. MATHES,
Judge, United States District Court.

APPENDIX D.

Pages 2 through 55 and pages 63 through 65, Brief for Appellees in Clark vs. Inouye and Acheson vs. Murakami, Nos. 11839 and 12082, in the United States Court of Appeals for the Ninth Circuit.



APPENDIX E.

Decision of United States Department of Justice, Board of Immigration Appeals, dated December 13, 1945, in the case of Ismael Acosta-Hernandez, No. 56196/251—El Paso and Memorandum dated May 6, 1946, prepared by the legal advisor to the Department of State.

Nos. 12,251 and 12,252

IN THE

United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, as the Attorney
General of the United States, et al.,
Appellants,
(*Defendants Below*)

vs.

No. 12,251

TADAYASU ABO, et al., etc.,
Appellees,
(*Plaintiffs Below*)

and

J. HOWARD McGRATH, as the Attorney
General of the United States, et al.,
Appellants,
(*Defendants Below*)

No. 12,252

vs.

MARY KANAME FURUYA, et al., etc.,
Appellees.
(*Plaintiffs Below*)

APPELLEES' PETITION FOR A REHEARING.

FILED

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and Petitioners.

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Nos. 12,251 and 12,252

IN THE
United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, as the Attorney
General of the United States, et al.,
Appellants,
(Defendants Below)

vs.

No. 12,251

TADAYASU ABO, et al., etc.,
Appellees,
(Plaintiffs Below)

and

J. HOWARD McGRATH, as the Attorney
General of the United States, et al.,
Appellants,
(Defendants Below)

vs.

No. 12,252

MARY KANAME FURUYA, et al., etc.,
Appellees.
(Plaintiffs Below)

APPELLEES' PETITION FOR A REHEARING.

(NOTE): The appellees herein are referred to as plaintiffs and the appellants as defendants.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Tadayasu Abo, Mary Kaname Furuya, and all other adult appellees (plaintiffs below), against whom an unfavorable opinion and decisions herein were handed down by this Court reversing the judgments of the District Court below and remanding the causes as to them to that Court, demand a rehearing of their causes on appeal upon the following grounds and for the following reasons:

I.

MATERIAL RECORD FACTS WHICH THIS COURT'S OPINION OVERLOOKED IN DECIDING APPEALS.

The plaintiffs' motions for judgment on the pleadings and the respective motions for summary judgment were submitted to the trial Court on November 18, 1946. The affidavits in support thereof and the final brief had been filed by February 11, 1947. On February 20, 1947, the cases were transferred to Judge Goodman because of the illness of Judge St. Sure. (See Opinion at R. 176 in No. 12,195 reciting these facts.) Thereafter, the trial Court considered the motions over a period of approximately eight (8) months until October 10, 1947, without a ruling being made thereon.

On October 10, 1947, in each equity case, the parties entered into the written Stipulation (R. 408(a)), submitting the causes to the trial Court for decision on the merits. It was so ordered, R. 408(b). In this Court's Opinion a portion of that Stipulation is quoted but a sig-

nificant part thereof which is highly material to the issues was not quoted and, what is more significant, appears to have been overlooked by this Court. The Stipulation reads as follows:

“STIPULATION

It is stipulated between the parties hereto that this case be submitted for decision to the Court on the cause, that is, on the merits and the present record as it stands, including any evidence by way of affidavits and exhibits submitted on the respective motions for summary judgment and for judgment on the pleadings that is legally admissible as competent, relevant and material evidence against the objections and exceptions made thereto and against the motion made to suppress the same, and that the proofs be closed provided, however, that if the Court deems it necessary for a proper decision of any factual or legal issue or issues involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon and, in such an event, the parties hereto shall have the same rights in respect to the introduction of such further or additional evidence as to any such plaintiff or plaintiffs as they would have had if they had not entered into this stipulation.

Dated: October 10, 1947.”

It was the understanding and intention of the parties plaintiff and defendant, counsel for the respective parties, and of the trial judge that the causes thereby were submitted to the trial Court for decision on the merits of the evidence which theretofore had been submitted by the parties on the motions for summary judgment. The par-

ties deemed that evidence, coupled with facts of which the Court could take judicial cognizance, was adequate for a complete determination of the factual and legal issues. There was no conflict in the evidence on the issue of factual duress—the conflict was simply one concerning which of the various duress factors or combinations thereof caused the renunciations.

Further, it was explicitly understood and it was the intention of the parties that the *proof be closed* and that no additional evidence whatever was to be introduced or offered by either side. Each of those Stipulations expressly provides:

“* * * the proofs be closed provided, however, that if the Court deem it necessary for a proper decision of any factual or legal issue or issues involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon and, * * *”

The parties plaintiff and defendant, after some eight (8) months of negotiation and discussion decided that they respectively would risk a decision on the merits by such a submission of the causes on that basis. Under that Stipulation and the order which issued thereon submitting the causes both sides produced and submitted all the evidence they desired to submit. Both sides realized that if the facts were resolved against one side that side would be bound by those findings. If the parties were willing to run that risk, especially the plaintiffs who had everything at stake while the defendants had nothing at stake, it ill becomes this Court to ignore the provisions of the Stipulations and, in effect, to set them aside and re-

verse judgment as to the adult plaintiffs. There were powerful reasons why the defendants, up to and including the submission date, did not offer or even attempt to offer any such evidence as is mentioned in the offers of proof in the Designations later filed by counsel who succeeded those acting for the defendants when the causes were submitted. The reasons they did not do so hereinafter are set forth.

The trial Court did not order designations to be filed or the production of further or additional evidence.

We direct attention to the fact that the trial Court *did not deem* it necessary to order the production of further or additional evidence as to any plaintiff or plaintiffs. It *did not order the production of further or additional evidence* as to any particular plaintiff or plaintiffs. *It did not order any designations to be filed.* Neither the Stipulations submitting the causes (R. 40S(a)) nor the Order of Court made thereon (R. 40S(b)) were ever nullified or set aside by the trial Court.

In its Opinion this Court assumed that the trial Court ordered the defendants to produce further or additional evidence. However, that assumption is erroneous and is based upon a misconstruction of those Stipulations and the Orders of Court which issued thereon submitting the causes in accordance with the terms thereof.

The trial Court's Opinion, at R. 426-7, giving the defendants 90 days within which to designate states:

“It may be that if the defendants were to go forward with further proof, they could present evidence that certain of the plaintiffs individually acted freely

and voluntarily despite the present record facts. Therefore, it is further ordered that defendants may have 90 days from date hereof within which to file a designation of any of the plaintiffs concerning whom they desire to present further evidence. As to any plaintiff, not so designated by the defendants within the time specified, a final decree may enter. As to any plaintiff designated in the manner and within the time specified, further hearings, after notice duly given, will be held."

The trial Court's Opinion giving the defendants that time within which to designate *certain of the plaintiffs* against whom they might wish to present further evidence *is not an order* to them to do so and is not even a direction to them to do so as against certain plaintiffs, all plaintiffs, or any plaintiff. It is nothing but an invitation at most, or courtesy shown them or an opportunity given them to designate certain, not all, plaintiffs, conditioned on strict compliance with the proviso in the Interlocutory Decree, at R. 431, that any such Designation that might be made must be made "*in an exercise of good faith*", and must be such a Designation as was contemplated and understood might be made. Neither the Opinion nor the Interlocutory Decree can be construed to evince an intention that the trial Court designed them to enable the defendants to convert the Stipulations and Orders submitting the cause into nullities or to enable them to reopen the causes as to all the plaintiffs. Every intendment is against any such absurd construction.

The Interlocutory Decree does not order the defendants to designate any plaintiff or plaintiffs and it does not order the defendants to produce any further or addi-

tional evidence as to any plaintiff or plaintiffs. It merely extends an opportunity to the defendants to make a proper designation as contemplated in the Opinion and conformable thereto. Neither the trial Court's Opinion nor the Interlocutory Decree nullified the Stipulations and Orders submitting the causes or reopened the causes as to all the plaintiffs.

II.

THE DESIGNATIONS WERE SHAM AND PROPERLY WERE STRICKEN.

The Designations filed by the defendants *name all the plaintiffs* by grouping their names into various insignificant classifications. In consequence, they were not Designations at all. They were not filed in good faith. They were sham. They properly were stricken.

Neither the Stipulations submitting the cause, the Orders of submission, the trial Court's Opinion or the Interlocutory Decrees authorized any offers of proof to be made. The *proofs were closed* by the Stipulations and the Orders submitting the cause. It is to be assumed that the defendants entered into those Stipulations in good faith and with intent to abide by them at the time of submission. They did abide by them until after the Opinion, R. 410, was handed down and thereafter until they filed the spurious Designations.

After the cause was submitted on the merits the defendants had ten (10) months' time within which to prepare and file proper Designations *in good faith*. The bare fact that, contrary to the trial Court's Opinion and the

Interlocutory Decrees allowing defendants to go forward with further evidence as to certain plaintiffs who might be designated, the defendants filed spurious Designations naming not certain plaintiffs but all the plaintiffs, is sufficient proof that the defendants made no attempt whatever to comply with the permission given them to designate certain plaintiffs if done in good faith. Furthermore, the fact that the defendants took a full ten (10) months' time just to file Designations simply listing all the plaintiffs by name, under various subheadings, with offers of proof covering matters the Court already had decided proves the Designations were dilatory and constituted sham.

We direct attention to the fact that the defendants had from October 14, 1946, when plaintiffs' motions for summary judgments were served on defendants and filed below (R. 146), to October 10, 1947, when the parties entered into the Stipulations (R. 408a) submitting the causes on the merits, within which to submit to the Court below the very evidence to which their offers of proof refer. They declined to do so because (1) the issues of factual duress and coercion as they affected each plaintiff already had been tendered by ample evidence, in the form of affidavits, pleadings stipulated to be used as and to be considered as though they had been made and filed by each plaintiff on his or her own behalf, and matters of which the trial Court might take judicial cognizance; (2) the introduction of voluminous individual records and matters pertaining to each plaintiff, including their responses to Question No. 28 in the questionnaire, questions whether they were Kibei, had spent some time in Japan,

had requested to be sent to Japan, etc., would serve no purpose except to clutter up the Court records.

The evidence offered by both sides at the time of submission was offered for the purpose of having determined all the factual issues as to all the plaintiffs. Neither side intended to introduce any additional evidence. The affidavit of John Burling tendered the whole of the government's defense to the suits with the frank statement of the factual duress which caused the renunciations. See R. 208 where he states, in summary:

"If these factors and this hysteria render the act of renunciation by persons detained under these circumstances void, then the renunciations are void. If the court is now to hold that the totality of the circumstances described in this affidavit constitutes coercion, then these renunciations were coerced."

The defendants also declined at the time the causes were submitted to the trial Court to introduce or offer any such evidence as is referred to in the offers of proof in the Designations because they did not deem any of it to be admissible for reasons and rules of law hereinafter discussed. They had ample opportunity to offer any such evidence up to the time the causes were submitted for decision. They declined to do this. That constituted a waiver of any right to do so later. We see no reason why they now, under this Court's Opinion, should be permitted to do what they had ample opportunity to do up to the time of submission and failed to do for good reasons.

The documents the defendants eventually filed some ten (10) months after the Opinion of the trial Court had

been handed down were not proper or authorized Designations at all. They are lists of all the plaintiffs classified under various headings with statements of what generally might be offered to prove the classifications. The Designations were not filed in good faith. They demonstrate, however, that the trial Court and counsel for plaintiffs had been misled into believing that if the defendants were to file designations they would be ones made and filed in an exercise of good faith against only a few of the plaintiffs. See motion to strike, R. 442; affidavit in support thereof, R. 445, and order striking designations, R. 455, 449. We see no good reason why this Court, on the basis of these record facts, now should permit the defendants on the basis of those spurious Designations to reopen the causes as to all adult plaintiffs. Further, we submit that no jurisdiction is lodged in this Court to set aside those Orders Striking the Designations for sham because those orders were made upon motions supported by affidavit and facts of which that Court had actual as well as judicial knowledge and, as hereinabove pointed out, without any real opposition thereto on the part of the defendants. Inasmuch as the findings of fact made on evidence adduced on those motions were clearly correct they cannot be set aside. No supervisory jurisdiction to set aside such findings of the District Court is lodged in this Court. We point out that this Court has overlooked the significance of this important matter for its Opinion contains no reference thereto.

III.

THIS COURT'S OPINION FAILED TO CONSIDER THE FACT THAT THE DESIGNATIONS FILED WERE NOT SUCH AS WERE AUTHORIZED AND WERE NOT FILED IN GOOD FAITH AND PROPERLY WERE STRICKEN.

The Interlocutory Orders, Judgments and Decrees, R. 430, at 431, specifically provided that any Designation that might be filed by the defendants must be filed "*in an exercise of good faith*". The defendants had a period of ten (10) months (303 days) from April 29, 1948, (the Opinion date) to February 25, 1949, within which to examine their records and file such documents. The Designations were not filed in good faith. Plaintiffs' motions to strike the Designations were made on the charge that those documents were "*not filed in good faith*". See R. 442 at 444. The issue of whether or not they were filed in good faith was a matter for the trial Court to determine—and not a matter for this Court to pass upon in the absence of an abuse of legal discretion by the trial Court. The trial Court ruled on the motion and struck the Designations because he found as a fact that they were not filed in good faith. The affidavit of February 28, 1949 (R. 445), supporting the motion to strike sets forth the specific evidentiary grounds therefor. Those grounds also were matters of which the trial judge had actual knowledge and were matters of judicial knowledge. They proved that the Designations were not filed in good faith. Further, that motion came on regularly for hearing on March 21, 1949, before the Court. Oral argument was had thereon. *The defendants did not file any counter affidavits in opposition.* That was an admission that the Designations were not filed in good faith. The oral argu-

ment made on behalf of the defendants, which is not evidence, consisted of reading to the Court a letter of instructions to defendants' counsel. (This is set forth at R. 456). It is a masterpiece of evasion. Its context admits that the most the Attorney General could do, insofar as evidence was concerned, was to make in this cause:

“as strong a case as can be made for sustaining the validity of the renunciations as were made in the cases now on appeal from the decisions of the District Court for the Southern District of California. In view of that fact and in view of Judge Goodman's opinion in the instant cases, the Attorney General feels that he cannot properly concede that the renunciations of any of the designated plaintiffs were involuntary as a matter of fact or law. He, of course, reserves the right to take a different position in the event that the decisions now on appeal should be sustained.”

The reference in that letter to the cases on appeal are to the Murakami and companion cases. The letter admits that the most the Justice Department could do in the instant cases was to present a case as strong as those it presented in the Murakami and companion cases. Inasmuch as the Justice Department had lost the Murakami and its companion cases in the trial Court and thereafter lost on appeal in this Court it is difficult to see, in the light of that admission, how it could produce evidence enough to prevail in the instant cases. The instant cases could have been decided by the trial judge in favor of the petitioners and against the defendants solely upon such an admission had it been made on or before the submission of the cause on the merits to the trial Court.

Further, on the merits of the motion to strike and order to show cause why the Designations should not be stricken, the trial Court found (R. 457-459) that the Designations were not filed in good faith and in nowise conformed to or complied with the Court's Opinion, the Interlocutory Order, Judgment and Decree, and were not of the type for which the defendants were given an opportunity to designate but were sham.

The fact that the Designations were sham and were never even intended in good faith to constitute Designations in compliance with the permission given is evidenced clearly by the fact that in the Designation filed February 25, 1949, Exh. XXII-1, it is admitted that the eight (8) plaintiffs there named were insane at the time their renunciations were taken, and in Exh. XXI-1 that the renunciations of the eight (8) plaintiffs there named had not been approved.

In the face of the foregoing facts, proved by the record, we submit that the trial Court did not abuse its discretionary power but acted entirely within the limits of judicial discretion in striking the Designations for good cause shown. In consequence, we submit that this Court is bound by the record and by the finding of the trial Court on this issue. We suggest that for this Court to ignore the record facts and the finding of the trial Court thereon constitutes an abuse of judicial discretion and is an attempted exercise of a power and control over the District Court below which is not lodged in this Court. Because the Designations properly were stricken the plaintiffs were entitled to a final judgment. This is true whether the plaintiffs sustained their burden of proof to

establish their sought for relief by a preponderance of direct evidence proving the ultimate facts or simply through the operation of a presumption. In either event the plaintiffs were entitled to judgment. If the presumption theory is invoked the judgment was proper because it is the rule of the Ninth Circuit (*Department of Water and Power v. Anderson*, (CCA-9), 95 Fed. (2d) 577, 583-5), that the trial judge, sitting without a jury, was required to draw the inference the renunciations were the products of coercion. If the trial Court had applied only the California rule relating to presumptions (*Pozzobon v. O'Donnell*, 1 Cal. App. (2d) 151), it attached weight to the inference, although not required so to do, because of its compelling force and accuracy in arriving at the truth.

IV.

THIS COURT HAS NO SUPERVISORY CONTROL OVER THE DISTRICT COURT BELOW TO IGNORE ITS FINDINGS ON THE MERITS SUPPORTED BY AMPLE EVIDENCE OR TO SET ASIDE THE ORDERS STRIKING THE DESIGNATIONS FOR GOOD CAUSE SHOWN.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly erroneous." The trial Court had considered, on the submission of the causes, all the evidence which the defendants' offers of proof in their Designation do but reiterate and re-tender. It had rendered its Opinion deciding those issues. Thereafter it specifically found that the Designations and offers of proof related to nothing but matters which already had been considered and de-

cided and, therefore, struck them out as constituting sham. See Order Striking, R. 457-8. We submit that this Court's supervisory control over the District Court below does not extend to revising the trial Court's findings either on the evidence submitted on the cause or on the evidence submitted on the motion to strike those Designations because those findings were not erroneous but were based upon substantial evidence.

V.

ALL MATTERS SPECIFIED IN OFFERS OF PROOF IN THE DESIGNATIONS ALREADY HAD BEEN CONSIDERED, WEIGHED AND PASSED UPON BY THE TRIAL COURT AGAINST THE GOVERNMENT.

The fact that any plaintiff was a Kibei, had received some education in Japan, had been a member of any of the suspected organizations at Tule, had requested to be sent to Japan, had been suspected of disloyalty, was under a removal order or was not under a removal order was tendered by the affidavits and other evidence on which the cause was submitted to the trial Court for decision. The offers of proof in the Designations do nothing but list all the plaintiffs under those classifications. The trial Court already had considered, weighed and found from the evidence before him that membership in organizations and requests to be sent to Japan were the results of the unconstitutional detention and coercion. It already had considered, weighed and found that being a Kibei, having received some education in Japan, having been suspected of disloyalty and being under a removal

order had no relevancy except to explain the reason for evacuation, detention and internment. The offers of proof contained in the Designations specified nothing that had not already been tendered by the evidence and nothing that had not already been considered by the trial Court and been resolved in favor of the plaintiffs. See Order Striking Designations at R. 457-8 so stating.

Because these evidentiary matters were resolved by the trial Court in favor of the plaintiffs on adequate evidence these issues should not be reopened simply to satisfy the whims of the Justice Department. The conditional permission given to the defendants by the trial Court to go forward with further proof as to certain plaintiffs (R. 426-7) did not authorize the reopening of issues which already had been decided in favor of plaintiffs. We suggest that this Court has overlooked these important matters in its Opinion and that it gave no consideration thereto.

The trial Court found that those renunciants who, despite the coercion, acted freely and voluntarily in renouncing were not in the suit. See, Opinion, R. 415, which states, "However, these are not the renunciants who are here seeking restoration of citizenship. Those who did act freely were members of the pro-Japanese organizations at Tule Lake, who have already been repatriated to Japan in accordance with their express wishes." We direct attention to the fact that this clearly referred to the citizens in the group of 62, mentioned in the Burling affidavit, R. 166, none of whom were in the suits or believed to be or intended to be included therein. Inasmuch

as their names were not supplied by the Justice Department the trial Court evidently left the matter open for the Justice Department to show whether any of them might have joined in the suit. This would explain why its Opinion, at R. 426-7, gave the defendants an opportunity to designate in the first place.

The fact that some of the petitioners may have been members of the so-called pro Japanese organizations at Tule Lake was considered by the trial Court. That fact was tendered by the affidavits. See R. 265. The Court below considered this matter. See its Opinion at R. 412, showing it was considered and R. 425 where it held that such members acted abnormally because of abnormal conditions not of their own making and that, by reason thereof, although they may have detrimentally affected others, they were not to be held responsible. The trial Court considered the fact that many renunciants had been transported to Japan on their requests (R. 150) made in the concentration camp. See Judgment at R. 484, where defendants were restrained from interfering with their right to return and R. 490 where it modified the injunction as to the Secretary of State and his consular agents in Japan. The transportation to Japan on their requests made during unconstitutional confinement was treated by the trial judge as being a direct product of the coercion.

VI.

**IT IS IMPOSSIBLE FOR THE GOVERNMENT TO OVERCOME
THE PROOF AND PRESUMPTION OF COERCION.**

This Court has gone out of its way to state in its Opinion that the vague proposed evidence as to each group of plaintiffs specified in the spurious Designations the defendants would like to offer, save as to one group of 58 plaintiffs, "would overcome the presumption of coercion". We direct attention to the fact that this Court is not a sifter, finder and weigher of fact. That statement is erroneous and ought to be deleted from the Opinion because it might be construed by a trial Court to constitute a direction to it on the weight to be attached to evidence, a matter we submit is wholly within the province of a trial Court or a jury to consider, weigh and determine. The trial Court's Order Striking the Designations at R. 449-450 demonstrates it previously had considered all the matters later set forth in the offers of proof and had decided that such matters were insufficient to meet the plaintiffs' evidence of coercion. In consequence, this Court erred in even stating that any such evidence as is referred to in the offers of proof would overcome the presumption of coercion.

VII.

EQUITY APPEALS INVOLVE TRIALS DE NOVO IN APPELLATE COURT AND IN CONSEQUENCE THIS COURT SHOULD GIVE CONTROLLING EVIDENTIARY WEIGHT TO GOVERNMENT'S ADMISSION AND TO PLEADINGS USED, PER STIPULATION AND COURT ORDER, AS THOUGH THEY WERE INDIVIDUAL AFFIDAVITS FILED BY EACH PLAINTIFF.

The trial Court, R. 414, did not consider the effect of the Fortas letter (R. 75) because it was stricken as a pleading. It was introduced as evidence in the affidavit of Besig at R. 284-5 and was annexed thereto. As an official communication and also as an admission of the government it is controlling on the issue of factual duress for it specifies that *every renunciation* was caused by duress. This Court on this appeal has the power and duty to give effect to that official admission and to attach controlling weight to it. The admission (R. 77) is that over 80 percent of the confined citizens eligible to renounce did so primarily because of the pressures of organizations. The organizations were government sponsored.

Because these appeals in equity in essence and fact involve trials de novo on appeal this Court can and should consider and should attach controlling weight to that governmental admission because it is part of the evidentiary record on appeal even though the trial Court did not consider it. See *Hopkins v. Texas Co.* (CCA-10), 62 Fed. (2d) 691, cert. den. 290 U.S. 629; *Arco Equipment Co. v. Herring Wissler Co.* (CCA-8), 84 Fed. (2d) 619; and 5 C.J.S., p. 247, Sec. 1526 et seq., for expressions of this rule.

The verified complaint, supplement thereto and the amended complaint were filed as and for affidavits for each of the plaintiffs in lieu of filing separate affidavits for each plaintiff. The Stipulation (R. 408a) and Order thereon (R. 408b) so provide. See R. 224. They are to be treated as though they were affidavits made and filed by each individual plaintiff for and on his own behalf. They allege each renounced as a result of his or her mental fear and physical duress induced by the conditions prevailing in the concentration camp. This Court's Opinion ought so to have treated them.

VIII.

THE RENUNCIATIONS ARE ILLEGAL AND THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE AGAINST PLAINTIFFS AND OBTAINED FROM THEM DURING DETENTION IS ILLEGAL AND INADMISSIBLE UNDER UPSHAW AND McNABB RULES.

The renunciation applications made by the plaintiffs during their unconstitutional internment, and any requests any of them made to be sent to Japan and any statements made at their renunciation hearings are illegal on their face and are inadmissible in evidence. Those things fall into the classification of extrajudicial confessions made by them during a long imprisonment, inflicted upon them for no reason except the irrelevancy of racial origin, and from which they had no expectation of release except to face a hostile community in an impoverished condition or to seek deportation to Japan to avoid indefinite internment. They are illegal and inadmissible

under the rules laid down in *Upshaw v. U.S.*, 335 U.S. 410, and *McNabb v. U.S.*, 318 U.S. 332. (We direct attention to the fact that the trial judge's Opinion (R. 425) shows that the *McNabb* decision was considered and its rule was applied by him to the instant cases.) The rules there laid down hold illegal and forbid the introduction of statements and documents made during a long confinement, and also forbid the detention of persons for the purpose of investigation. We direct attention also to the fact that all the plaintiffs were and long had been detained for investigation purposes and were under investigation by the government at the time of renunciation. Further, we also draw attention to the fact that all of them were held without accusation having been filed against them and without hearings being afforded any of them on the reason or question of necessity for their detention.

Counsel for the defendants were aware of the existence of the foregoing rule and of the *McNabb* decision at the time the causes were submitted to the trial Court below for decision of the merits. It was because of that rule that they did not attempt to introduce any such evidence as is mentioned in the purported offers of proof subsequently made in the spurious Designations later prepared and filed by their successors.

IX.

THE RENUNCIATIONS ARE ILLEGAL AND THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE AGAINST PLAINTIFFS AND OBTAINED FROM THEM DURING DETENTION IS ILLEGAL AND THESE ARE INADMISSIBLE FOR BEING THE FRUITS OF WRONGDOING BY THE GOVERNMENT.

The renunciations taken by the Attorney General while the plaintiffs were held in concentration camps, pursuant to the admitted governmental objectives for which the statute was enacted (R. 158-161), i.e., to insure their continued detention or to remove them to Japan, are illegal on their face for being "*the fruits of wrongdoing*" by the federal government and its agents. Likewise, any statement or declaration they made at the renunciation hearings or during their long detention were the "fruits of wrongdoing" and are illegal and could not be introduced in evidence or used against any of the plaintiffs. The government cannot prevail over the plaintiffs by asserting its own wrongs or the wrongs of its own agents. See principle announced in *Weeks v. U.S.*, 232 U.S. 383; *Upshaw v. U.S.*, 335 U.S. 410; *McNabb v. U.S.*, 318 U.S. 332; *Lustig v. U.S.*, 338 U.S. 74. Counsel for the defendants at the time the causes were submitted to the trial Court for decision on the merits were aware of the existence and applicability of this rule. It was one of the reasons they were anxious to submit the causes on the evidence which had been adduced without making a futile endeavor to introduce any such illegal statements and documents. To make certain that no such inadmissible evidence could creep into the cases through the medium of the affidavits filed by the defendants the plaintiffs filed their objections

thereto and motion to strike, R. 318, and like objections, motion to strike and to suppress evidence illegally obtained, R. 397.

X.

THE RENUNCIATIONS AND THE PURPORTED EVIDENCE GOVERNMENT'S OFFER OF PROOF PROPOSES TO INTRODUCE ARE ILLEGAL AND INADMISSIBLE BECAUSE PROCURED BY INDUCEMENT.

Whether the government, through the instrumentality of renunciation, offered the plaintiffs internment as security against facing a hostile community in an impoverished condition or removal to Japan as liberation from prolonged and indefinite internment, the only two alternatives open to them, (or for any other reason for that matter), the renunciations as such offers were illegal *inducements* made by the government which invalidate the renunciations. They are void for constituting a deprivation of the due process of law guaranteed by the 5th Amendment. See *Bram v. U.S.*, 168 U.S. 532. Renunciations or any statement made by a person during internment are illegal and could not, in any event whatever, be admitted into evidence unless they were entirely free from *coercion* and from *inducement*. See *Bram v. U.S.*, *supra*; *Watts v. Indiana*, 338 U.S. 49; *Turner v. Pennsylvania*, 338 U.S. 62; and *Harris v. South Carolina*, 338 U.S. 68. Counsel for the defendants were aware of the existence and applicability of this rule at the time the causes were submitted for decision on the merits. That also is one of the reasons why they were willing to submit the cause on the merits of the evidence adduced

without making a fruitless attempt to introduce any such statements and documents which they knew to be clearly inadmissible. The offers of proof proposed by counsel who later represented them relate to just such statements and documents and are inadmissible.

XI.

THE RENUNCIATION APPLICATIONS AND ALSO THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE ARE ILLEGAL AND ARE INADMISSIBLE UNDER BRAM RULE BECAUSE GOVERNMENT CANNOT LAY FOUNDATION OF VOLUNTARINESS.

The renunciation applications signed by petitioners during their internment, and any request any of them made to be sent to Japan or other statements made at their renunciation hearings or during their detention are not admissible in evidence on other grounds in addition to those laid down in the *McNabb* and *Upshaw* cases. The defendants did not offer to introduce any such statements and documents on or by the time the cause was submitted to the trial Court below for decision on the merits because counsel then representing them were aware of the fact that the defendants could not meet *their burden of first laying a preliminary foundation that they were voluntarily made* by the renunciants. See *Bram v. U.S.*, 168 U.S. 532, 549; *Litkofsky v. U.S.* (CCA-3), 9 Fed. (2d) 877, 882. See also *Mangum v. U.S.* (CCA-9), 289 Fed. 213, 215, where this Court held that before such matter could be admitted the trial Court must determine the question of voluntariness preliminarily. Although those

cases relate to confessions involved in criminal cases it is to be presumed the rule they announce concerning the introduction of such evidence is applicable to civil cases which involve loss of citizenship status, all civil rights and banishment which, in itself, is criminal or at least quasi criminal punishment.

Note also that the trial Court below determined that the renunciations of the plaintiffs were involuntary on the basis of the evidence before it which was conflicting in nature only as to the combination of factors which accounted for them. It was also because the defendants' counsel recognized that they could not lay a preliminary foundation that the renunciations, or any statements or declarations of the plaintiffs were voluntary that they were content to submit the cause on the evidence they supplied at the time.

The renunciation applications, statements made at the renunciation hearings and requests to be sent to Japan made by some, all made during their unconstitutional detention, all fall into the classification of extra-judicial confessions. At those pseudo-hearings held by Justice Department agents each plaintiff was confined in a closed room with government agents and was deprived of the benefit of counsel, witnesses and friends. See R. 176-177 admitting this. In consequence, such statements and documents are not admissible under the *Bram* rule unless the government first lays a foundation that such were made voluntarily by the plaintiffs. Inasmuch as this was a burden impossible for the government to meet, in view of the long imprisonment and the proved conditions existing

in the concentration camp, no good purpose is served by having the cause reopened as to the adults just to give the government another chance to offer evidence its counsel recognized was inadmissible because the government could not lay that preliminary foundation that the renunciation applications and any such statements or documents were made voluntarily and were not the products of the unconstitutional detention, fear, undue influence, coercion and duress.

XII.

THIS COURT'S OPINION OVERLOOKED FACTORS WHICH RENDER THE STATUTE VOID FOR DENYING EQUALITY AND DUE PROCESS OF LAW.

The renunciation statute, Title 8 USCA, Sec. 801(i), (Act of July 1, 1944, (58 Stat. 677)), was enacted by Congress at the special instance and request of the Justice Department for the disclosed sole purpose of procuring the renunciations of a special group of Nisei detained in our concentration camps simply to insure a prolongation of their unconstitutional internment and for no other purpose whatsoever. See Burling affidavit, No. 12251-2, so admitting and relating its history. It was applied to them and to no other persons or class of persons. When the renunciations of Nisei had been obtained in the concentration camps and their continued internment thereby was assured and the Attorney General had time to approve and did approve those renunciations by the middle of 1947, Congress, obviously on the suggestion of the Attorney General, by Joint Resolution of July 25, 1947, 61

Stat. 449 at 454, *rendered the statute inoperative*, along with a large number of other emergency and war power measures.

If the renunciation statute is not special class legislation there is no such thing as class legislation. If, as applied to petitioners, it was not an unequal application of the law there is no such thing as an unequal application of the law. The test of equality in the application of a law, within the rule announced in *Yick Wo v. Hopkins*, 118 U.S. 356, is not whether legislation might or could be applied equally to all persons within a proper classification but whether or not it actually so is applied. If the Justice Department can use a consenting Congress to pass temporary legislation, in the guise of permanent legislation, for it to apply only to Nisei held in prison simply because of their lineage and, so soon as its agents have procured their renunciations and the Attorney General has been given time to approve those renunciations, then has Congress render the statute inoperative so that it cannot be applied to others it is obvious the law is special discriminatory class legislation and that it was applied with an evil eye and an unequal hand.

The motive that prompted the passage of the statute, the purpose to which it was put and the fact that it was rendered inoperative immediately the special purpose had been served, thereby blocking all other persons from renouncing, demonstrates it was designed as special discriminatory class legislation and was used as such. The short time during which it was in force in itself shows that it was to serve the limited purpose of obtaining renunciations of the Nisei arbitrarily and wrongfully im-

prisoned and of no other persons. The statute states on its face that it shall be in force and effect "whenever the United States shall be in a state of war". We are still in a state of war but the statute is not in force and effect. It has been operative since July 25, 1947. In consequence, no conclusion can be drawn from these facts except that the discrimination against the Nisei was a deliberate congressional and executive policy to obtain the renunciations of a special group of imprisoned Nisei and to block all other persons in prison and out of prison from like renunciations. As such it was not only special class legislation but was applied unequally and violates the due process clause of the 5th Amendment. We direct attention also to the fact that the Justice Department cannot show that it was applied to persons other than already interned Nisei.

XIII.

THIS COURT FAILED TO CONSIDER AND PASS ON QUESTIONS THAT THE STATUTE IS VOID FOR BEING A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

Congress passed the renunciation statute to obtain renunciations from the incarcerated Nisei and from no other persons for the admitted purpose of converting their unconstitutional detention into internment just to insure their continued detention "without violating the Constitution". See R. 160. The Attorney General took their renunciations for that specific purpose, ordered them interned and thereafter threatened them with removal to Japan although none of them had been guilty of violating

any law. In consequence, the statute, on its face and as applied, is nothing but a bill of attainder proscribed by Clause 3, Section 9 of Article I of the Constitution. Further, because this punishment was inflicted upon them for what the government deemed was past disloyal conduct or expression, although no hearings on such a matter had been given them, the statute, the internment and removal orders are void for being ex post facto and prohibited by Clause 3, Section 9 of Article I of the Constitution. This Court failed to consider and pass on these important questions of law.

XIV.

**NO QUESTION OF ANY PLAINTIFF'S LOYALTY IS INVOLVED
BUT THE GOVERNMENT'S DISLOYALTY TO THEM WAS
DEMONSTRATED.**

While this Court seemingly took satisfaction in declaring, on the basis of a *finding* it asserts it made in the Murakami case, that some interned Kibei were "permanently pro-Japanese" we state that any such evidence offered in that case was nothing but rank hearsay. None of the Kibei referred to therein who so unjustly were accused was a party thereto and none was given an opportunity to face his accusers. What we emphatically state is that not one was disloyal up to the time of evacuation; that none was disloyal thereafter up to the time he was compelled to elect to remain indefinitely in a concentration camp or be removed to Japan just to be liberated; and that none raised a hand against this country at any time.

What we do say and with emphasis is that the U.S. Government, the executive, legislative and judicial branches, were disloyal to these citizens and has proved that before all history by the vicious-evacuation-imprisonment-renunciation-removal program it inflicted upon them.

The government imprisoned, impoverished, hounded and harassed them—then, pursuant to a carefully-designed plan and trap, deliberately set about to get them to renounce in concentration camps so their imprisonment could be prolonged “without violating the Constitution” (R. 160)—and so the Attorney General, by later design, could remove them to Japan and thereby rid the country of a substantial number of our Nisei population. It was thus that the self-righteous government meant to *profit by its own wrongdoing* and whitewash the whole vicious program. The government sought to convert the unconstitutional detention of citizens not charged with crime into a “lawful” detention by taking renunciations and treating these as a ratification of that unconstitutional detention. If factual duress cannot be ratified by either the government or the petitioners (5 *Williston on Contracts*, p. 4348, sec. 1626) it is obvious that an unconstitutional detention cannot be converted into a lawful one by the method of ratification.

This Court’s Opinion indicates an undue concern about the security of this country, seemingly being fearful that a Kibei “enemy minded renunciant” might have his citizenship confirmed. We draw attention to the fact that loyalty is not an issue in the case. Neither is the goodness of a petitioner nor the question whether he is a de-

serving person. The factual issue involved is simply whether the renunciations were induced or procured by duress. If the Court is troubled about the possibility that a Kibei renunciant conceivably could have menaced our security we point out that not one at any time did. In its mistreatment of them the government menaced the Constitution which belongs to the People. Had they been treated as other American citizens and not been made the victims of the government's enmity and barbarity and not been compelled to suffer from the ravages of the "most outrageous incident or racial discrimination in American history" (R. 206) inflicted upon them not one renunciation would have resulted.

It was an expression of loyalty on their part to this country that they did not take advantage of the Japanese government's offer in November, 1941, to evacuate persons to Japan on the ships she sent for that purpose. See H. Rep. 113, pp. 11447, 11452. It was an act of loyalty that, in response to civilian exclusion orders, they trudged into shameful concentration camps which had been prepared for them. Thereafter, it took over two years of solid confinement before any of them, to escape indefinite or possible permanent incarceration in a concentration camp, registered even a feeble protest against their lot. This silent obedience was an expression of loyalty to the government.

It was only when they had been detained for over two years and were confronted with a choice of indefinite internment and final removal to Japan or being interned to escape the danger of facing a hostile civilian community in an impoverished condition that protests were

made. The form of the protest was the signing of the renunciations the government deliberately sought from them. These were provoked by the government. The victims were under compulsion to renounce in order to secure the protective safety of internment or to secure liberation by removal to Japan. Since when has it been disloyal to perform an act which is the result of coercion? A document executed by a disloyal person as the result of coercion is as void as one executed by a loyal one. The policy of the government and its treatment of them was a constant threat—it was coercion—it was duress. All the renunciations were directly caused by governmental duress. Any supposititious question of loyalty or disloyalty on the part of any renunciant, however, has nothing to do with these cases. The question involved is simply whether or not the renunciations were the products of duress.

In effect what this Court's Opinion says is that despite the wrongful evacuation and unconstitutional imprisonment, despite the wrongdoing by the government and its agents and the duress from which each petitioner suffered some of them may have renounced voluntarily. This is equivalent to saying that a renunciation which was nothing but the utterance of "ouch" by a person immediately following the receipt of a series of brutal kicks is a voluntary expression and not the consequence of the force applied by the government boot. It does violence to reason and is downright absurd.

We direct attention also to the fact that a large number of the renunciants were taken into the armed forces upon being liberated from internment by these suits. We

direct attention also to the fact that a substantial number of those against whom removal orders are still outstanding likewise were accepted by our armed forces. A goodly number of them now are serving at the battle-front in Korea. A number of them have been casualties and a few have been brought back to army hospitals in the United States for treatment and recuperation from wounds.

We suggest that a more inapt and inappropriate quotation of dicta has not been contained in an Opinion than that appearing in the one herein taken from the context of *Doreau v. Marshall*, 170 Fed. (2d) 721, 724, that "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material consideration suggests that course, is not duress". In that case it was held that if the appellant formally became a French citizen to prevent her incarceration in a German concentration camp she was the victim of duress and did not lose U.S. citizenship.

In the instant cases we suggest to this Court that a renunciation executed to escape indefinite or permanent internment in a concentration camp or as a method of insuring a prolongation of internment to escape the dangers of confronting a hostile community and lynch law is not a mere "difficult situation" and is not a "matter of expediency" but of necessity. These certainly are not "crass material consideration". What this Court forgot to add in its Opinion was the prefix to that quotation from the *Doreau* case which appears at page 724 and is applicable to the instant cases, viz.:

"If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country."

Further, loss of U.S. nationality does not result from acts of expatriation caused by duress. See *Don Reis ex rel. Camara v. Nicholls* (CCA-1), 161 Fed. (2d) 860, holding that the service of a citizen in a foreign army arising out of a choice between serving as a drafted soldier or confinement to a concentration camp did not expatriate him. See also, *Schioler v. U.S.* (DCND Ill.), 75 Fed. Supp. 353, holding that acts of expatriation taken in the face of "the gravest of dangers, even possible death or internment" were the products of duress and not binding. See also, *In re Gogal* (DCWD Pa.), holding that a citizen drafted into a foreign army does not lose his citizenship. The foregoing three cases are described by the Supreme Court in *Savorgnan v. U.S.*, 338 U.S. 491, 502, n. 18, as "cases of real duress".

This Court's Opinion expresses concern for the government. Suffice to state that the defendants, i.e., the administrative department of the present government which has caused so much of this trouble, is well able to take care of itself. This Court wastes its sympathy upon the undeserving governmental agents and agencies responsible for the terror invoked against the innocent interned Nisei. It ought to have been somewhat concerned, at least,

bout rectifying the criminal wrongs done to them by the government. All that the Court's Opinion herein has succeeded in doing is to supply more grist for the propaganda mills of Stalin and Mao Tse Tung to disseminate the charge throughout Asia that we are persistent in our oppression of defenseless minorities. Because this Court's utterances in its Opinion evidences slight concern for the rights of these oppressed persons and an undue concern to justify the tyrannical actions of our own government toward them we suggest that the interest and policies of the United States abroad have been harmed and that the cause of our opponents in Asia has been advanced.

CONCLUSION.

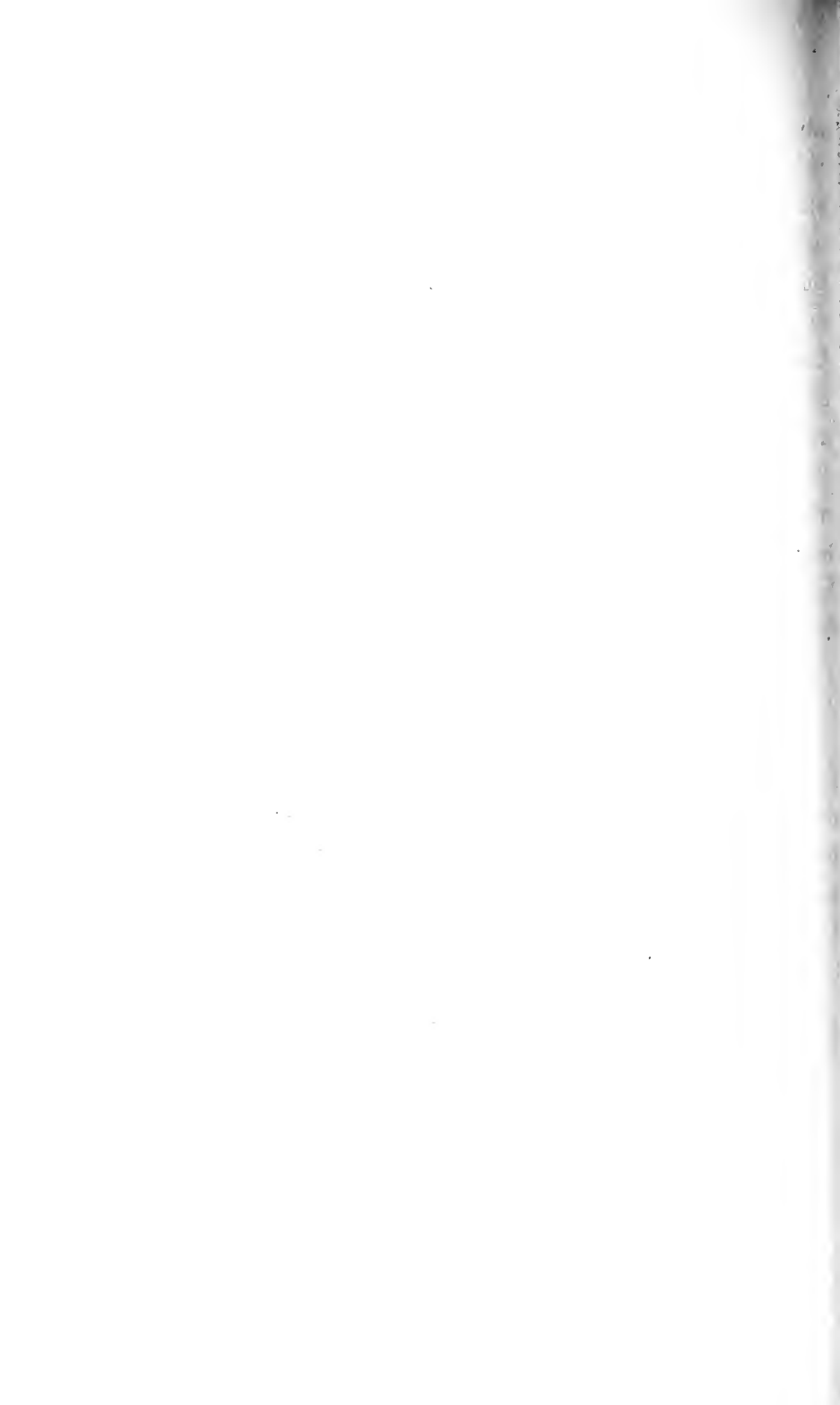
For the foregoing reasons said appellees urge this Court to withdraw its Opinion herein, to set aside its orders reversing the judgments of the District Court below as to them and remanding the causes to that Court, to grant them a rehearing on the serious issues involved herein and thereupon affirm the judgments of the Court below.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,

WAYNE M. COLLINS,

*Attorney for Appellees
and Petitioners.*



CERTIFICATE OF COUNSEL.

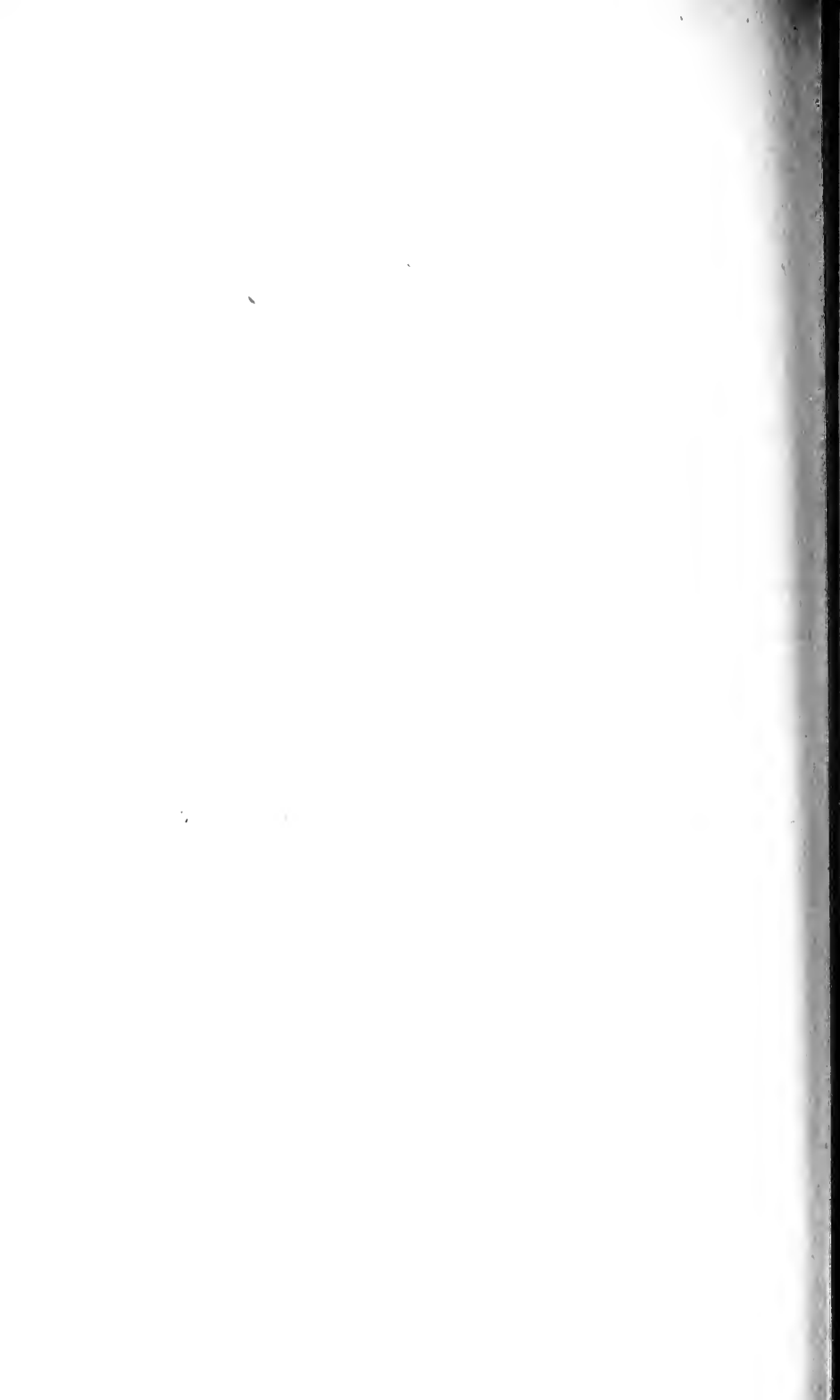
The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,

February 16, 1951.

WAYNE M. COLLINS,

*Attorney for Appellees
and Petitioners.*



No. 12257

United States
Court of Appeals
For the Ninth Circuit.

EDWARD R. BIGGS, JOHN R. HECTOR, H. J.
LUEDER and MARTIN M. MORENO,
Appellants,

vs.

JOSHUA HENDY CORPORATION,
Appellee.

Transcript of Record

Appeals from the District Court of the United States
for the Southern District of California
Central Division

FILED
SEP 26 1949

PAUL P. O'BRIEN,
CLERK

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No. 12257

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BRIDGES,

SAMUEL S. GILL,

ROBERT G. IRVIN,

ROBERT H. SANDERS,
215 W. 6th St., Suite 1004,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and
for Southern District of California, Central
Division

No. 5875-B

M. E. ELLIOTT and CHARLES W.
CARNAHAN,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORA-
TION, a corporation,

Defendant.

SECOND AMENDED COMPLAINT FOR
WAGES AND LIQUIDATED DAMAGES
DUE UNDER THE FAIR LABOR STAND-
ARDS ACT OF 1938

Plaintiffs complain and allege:

I.

Plaintiffs bring this action on behalf of themselves and other employees similarly situated, pursuant to Sec. 16(b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219), hereinafter referred to as the Act to recover over-time wages, liquidated damages and attorney's fees.

II.

Jurisdiction of this action is conferred upon the

Court by Sec. 16(b) of the Act and by Sec. 24(8) of the Judicial Code (28 U.S.C. Sec. 41(8).)

III.

The other employees similarly situated to the plaintiffs and on behalf of whom this action is brought, in addition to the plaintiffs are: Herman Belin, Edward R. Biggs, Alva A. Evans, Achilles O. Foley, John S. Garcia, W. E. Gardner, John R. Hector, F. E. [2] Laird, Charles J. Lunn, H. J. Lueder, Martin M. Moreno, Richard N. Porter, James S. Yates, David Quick.

IV.

Defendant is a corporation organized under the laws of the State of Delaware, authorized to do business therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

V.

At all times mentioned herein, defendant was engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to wit, ships, for interstate commerce within the meaning of the Act.

VI.

Within three years last past, the defendant employed the plaintiffs and the other employees similarly situated, on behalf of whom this action is brought, at its said place of business, in various occupations, in which plaintiffs and said employees

similarly situated were employed by the defendant in interstate commerce and in the production of goods, to wit, ships, for interstate commerce, within the meaning of the Act.

VII.

During their respective periods of employment by the defendant, as aforesaid, plaintiffs and said other employees similarly situated were compensated at various hourly rates. The precise periods of employment and hourly rates at which plaintiffs and each such employee were employed are contained in the books and records of the defendant and are not known to the plaintiffs at the present time. In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours, for forty (40) hours of which they were paid at straight time, and eight (8) hours of which [3] they were paid at time and one-half. In each week of their employment by the defendant, the plaintiffs and said other employees similarly situated worked hours in addition to said forty-eight (48) hours for which they were credited and paid, for which additional hours they were not credited and for which they received no compensation whatsoever. Said work was performed both during the time at which said employees were scheduled to take their lunch and before their shifts began and after their shifts ended, and the activities which they and each of them performed during said hours each day were and are compensable activities

within the meaning of the Fair Labor Standards Act of 1938 as amended by the Portal-to-Portal Act of 1947, by virtue of and in accordance with the express provisions of a written collective bargaining agreement then in effect between the plaintiffs, their collective bargaining representatives and the defendant.

VIII.

There is now due, owing and unpaid, from the defendant to the plaintiffs, and to each of the employees similarly situated, on behalf of whom this action is brought, a sum equal to the product of one and one-half times the regular rate at which each employee was employed, and the hours worked by each of them over and above forty-eight (48) each week for each week of his employment by the defendant, plus an equal amount as liquidated damages.

IX.

Sec. 16(b) of the Act provides that the Court in this action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant.

Wherefore, plaintiffs pray for judgment against the defendant and in favor of the plaintiffs and each of the employees similarly situated, on behalf of whom this action is brought, in a sum equal to the product of one-and-one-half times the regular rate at which he was employed and the hours worked by each of them over and above forty-eight

(48) each week for each week of his employment by the defendant, [4] plus an equal amount as liquidated damages, plus attorney's fees for services rendered herein, for costs of suit, and all proper relief.

MOHR & BORSTEIN, and
PERRY BERTRAM,

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs. [5]

State of California,
County of Los Angeles—ss.

Edward R. Biggs being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Second Amended Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938 and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ EDWARD R. BIGGS.

Subscribed and sworn to before me this 29th day of June, 1948.

[Seal] /s/ ELIZABETH N. DUMESNIL.
Notary Public in and for said County and State of
California.

Affidavit of service by mail attached.

Copy received.

[Endorsed]: June 30, 1948. [6]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION
OF FACTS AND ISSUES

Facts

It Is Hereby Stipulated between the plaintiffs and defendant through their respective counsel:

I.

At all times during the employment by defendant of the plaintiffs, and until October 27, 1945, the defendant produced ships under contracts with the United States Maritime Commission. Upon the completion of each ship, it was delivered, pursuant to said contracts, to the United States Maritime Commission at its shipyard at Terminal Island, County of Los Angeles, State of California.

Following the delivery of each ship, it was sent by the United States Maritime Commission from the State of California to points outside of the State of California.

II.

Defendant's Exhibit "A" is a copy of a contract between the United States Maritime Commission and the defendant, the [7] provisions of which except for delivery dates of ships to United States Maritime Commission, and method of payment to defendant, are identical to those contained in the other contracts which were in effect during the time material to the issues presented herein.

III.

During the period from and including July 24, 1944 to August 19, 1944, the defendant paid all foremen and leadmen for twenty minutes prior to and twenty minutes after their regular work shift. That from and including August 20, 1944, at which time the entire shipyard of defendant went on a two nine-hour shift basis, to and including January 7, 1945, defendant paid all foremen and leadmen for twenty minutes prior to and ten minutes after their regular work shift. Commencing on January 8, 1945, at which time the shipyard returned to the normal shift work hours, to and including September 2, 1945, the defendant paid foremen and leadmen for six minutes after their regular work shifts. Prior to July 24, 1944, and after September 2, 1945, defendant did not pay either foremen and leadmen for any time other than their regular working shift time.

IV.

Defendant's Exhibit "B" is a copy of a letter dated July 21, 1944, issued by the defendant's then Production Manager, J. S. Sides, and distributed as shown in said letter. Defendant's Exhibit "C" is a copy of a letter dated January 1, 1945, by J. M. Warfield, Assistant General Manager of the defendant, and distributed as shown in said letter. Defendant's Exhibit "D" is a copy of a letter dated August 31, 1945, issued by J. M. Warfield, then General Manager of the defendant.

V.

Plaintiff's Exhibit "1" is a copy of the collective bargaining agreement in existence between collective bargaining representatives of the plaintiffs and the defendant corporation, during the periods to which plaintiffs' claims relate. [8]

VI.

Defendant did not compensate the plaintiffs for lunch periods. Defendant's records do not show the plaintiff's lunch periods as hours worked. In the defendant's Answer to Interrogatories to be filed herein, the lunch periods of plaintiffs were not taken into account in indicating, therein, the number of days worked in each work week where more than forty hours was worked by each plaintiff.

Issues

1. Were the plaintiffs employed by the defendant in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938?

2. In which work weeks, if any, did any of the plaintiffs engage in work during their lunch periods or before their regular shift commenced or after their regular shift ended which constituted a compensable activity under the provisions of plaintiffs' Exhibit 1?

3. If any or all of these activities are com-

pensable, was the failure by defendant to pay plaintiffs therefor in good faith?

Dated: June 2, 1948.

MOHR & BORSTEIN and
PERRY BERTRAM,

By /s/ DAVID L. MOHR,
Attorneys for Plaintiffs.

THELEN, MARRIN,
JOHNSON & BRIDGES,

By /s/ ROBERT H. SANDERS,
Attorneys for Defendant.

It Is So Ordered.

Dated: June 21, 1948.

/s/ WM. C. MATHES,
U. S. District Judge.

[Endorsed]: Filed June 7, 1948. [9]

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL PROCEEDINGS

This matter came on regularly for pre-trial proceedings on June 21, 1948 in the above entitled court, Honorable William C. Mathes, Judge Presiding, the plaintiffs being represented by their counsel, Mohr & Borstein, and Perry Bertram, by David L. Mohr and Perry Bertram, and the defendant

being represented by its counsel, Thelen, Marrin, Johnson & Bridges and Samuel S. Gill and Robert H. Sanders, by Robert H. Sanders, and the parties having presented to the Court a pre-trial stipulation with exhibits thereon marked for identification, and the Court having considered all matters then pending and being fully devised,

It Is Ordered:

1. The Pre-Trial Stipulation of the parties is ordered filed and pursuant thereto the following exhibits are marked for identification:

a. Employment Contract—Plaintiffs' Exhibit I for identification.

b. Contract between United States Maritime Commission [10] and Defendant—Defendant's Exhibit A for identification.

c. Copy of letter dated July 21, 1944, issued by Defendant's production manager J. S. Sides, Defendant's Exhibit B for identification.

d. Copy of letter dated January 1, 1945 issued by Defendant's assistant general manager — Defendant's Exhibit C for identification.

e. Copy of letter dated August 31, 1945 issued by Defendant's general manager—Defendant's Exhibit D for identification.

2. By Stipulation defendant's objections to interrogatories propounded by the plaintiffs are withdrawn, and the defendant is ordered to answer interrogatories supplying the following information separately for each plaintiff, for each work week

in which the defendant's records show the particular plaintiff to have worked forty (40) hours or more:

- a. The employee's regular rate of pay; and
- b. The number of days worked in each such work week. Said responses to interrogatories are to be served and filed by the defendant no less than fifteen (15) days before the date of trial.

3. Plaintiffs' Motion to Amend their Complaint, to include claims for activities performed before the regular shift began and after the regular shift ended and to name all employees on behalf of whom this action is brought, is granted with ten (10) days leave to serve and file such Amended Complaint.

4. The matter is continued to Monday, September 13, 1948 at 10:00 o'clock a.m. for further pre-trial proceedings and for setting for trial.

Dated: July 13, 1948.

/s/ WM. C. MATHES,
U. S. District Judge.

Approved as to form—July 12, 1948.

THELAN, MARRIN,
JOHNSON & BRIDGES,

By /s/ ROBERT H. SANDERS,
Attorneys for Defendant.

Affidavit of service by mail attached.

Copy received.

[Endorsed]: Filed July 13, 1948. [11]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED
COMPLAINT

Defendant, Joshua Hendy Corporation, a corporation, formerly known as California Shipbuilding Corporation, answers the second amended complaint as follows:

I.

Answering the allegations contained in paragraph II of said second amended complaint, defendant denies each and every allegation thereof.

II.

Answering the allegations contained in paragraph V of said amended complaint, defendant alleges that until October 27, 1945, said defendant was engaged in the production of ships under contracts with the United States Maritime Commission at the Commission's shipyard at Terminal Island, California. Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph V of the complaint. [12]

III.

Answering the allegations contained in paragraph VI of said amended complaint, defendant alleges that plaintiffs were employed by defendant in various classifications and at various rates of pay in work necessary to the production of said ships being constructed under said contracts with the

United States Maritime Commission until October 27, 1945. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VI of said complaint.

IV.

Answering the allegations contained in paragraph VII of said amended complaint, defendant alleges that plaintiffs, and each of them, were fully paid for all hours in each work week in which said plaintiffs worked in excess of forty hours, and that any and all payments were made to said plaintiffs, and each of them, as required by the provisions of The Fair Labor Standards Act, as amended. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VII of said complaint.

V.

Answering the allegations contained in paragraph VIII and IX of said amended complaint, defendant denies each and every allegation contained in said paragraphs VIII and IX.

As a Separate, Further, and First Affirmative Defense, Defendant Alleges:

That the failure, if any, by defendant to fully comply with the Act was in good faith, and that defendant had reasonable grounds for believing that its act or omission in not paying each of the plaintiffs sufficient overtime compensation was not a violation of the Act.

As a Further, Second, and Separate Affirmative Defense, Defendant Alleges:

That the above entitled Court does not have jurisdiction of [13] the subject matter of this action and that the second amended complaint should be dismissed upon said grounds.

Wherefore, defendant prays that plaintiffs, and each of them, take nothing by their complaint and that defendant go hence with its costs.

Dated: July 27, 1948.

THELEN, MARRIN,
JOHNSON & BRIDGES,
/s/ ROBERT H. SANDERS,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed July 28, 1948. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause having come on regularly for trial before the above-entitled Court, Honorable William C. Mathes, Judge presiding, on January 19, 1949, the plaintiffs being present in person and by their counsel, Mohr & Borstein and Perry Bertram, by David L. Mohr and Perry Bertram, and the defendant being represented by its counsel, Robert

H. Sanders, of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and the parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted pre-trial memoranda of law, and having been fully heard, and the cause having been submitted,

The Court, being fully advised, makes the following

Findings of Fact

1. This action was brought by the Plaintiffs to recover from the Defendant unpaid overtime wages and liquidated damages as provided by the Fair Labor Standards Act of 1938 [16] (Public No. 718, 75th Cong., Ch. 676. 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219) hereinafter referred to as the Act.

2. At all times mentioned in these Findings, Defendant was a corporation duly organized under the laws of the State of Delaware, authorized to do business in California, and having and operating a shipyard located at Wilmington, California, within the territorial jurisdiction of this Court, where it was engaged in producing ships. All of the ships produced by the Defendant were, upon their completion, delivered at said shipyard to the United States Maritime Commission, which thereafter transported, delivered or took said ships from the State of California to points outside the State of California.

3. Said ships were produced by the Defendant pursuant to contracts with the United States Maritime Commission, let by said Commission under the provisions of Public Law 247 (77th Cong.) approved August 25, 1941, authorizing it to construct merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States, and suitable for the conversion into Naval or military auxiliaries, and said contracts were let by said Commission upon a determination that the vessels described in said contracts were of a type, size and speed which would be useful for carrying on the commerce of the United States and suitable for conversion into Naval or military auxiliaries.

4. On October 18, 1943, and until various dates, which will hereinafter be set forth as they may be material, the defendant employed each of the plaintiffs at and about its said shipyard in Wilmington, California, in various capacities, in each of which said plaintiffs and each of them were employed by the defendant in the production of said ships and in processes and in occupations necessary to said production of ships. [17]

5. At all times herein mentioned and material to the claims of the plaintiffs, there was in effect between the plaintiffs, their collective bargaining representatives and defendant, a collective bargaining agreement which contained the following material provisions:

“4. Hours of Employment and Overtime.

Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week. Monday to Friday, inclusive, between the hours of 8 a.m. and five p.m., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a.m. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week. Since this agreement is based on the intent of six-day-per-week operation, all work performed on Saturdays shall be paid for at one and one-half times the established hourly rate. Overtime at double the established rate shall be paid for all work performed on Sundays and Holidays. These provisions relative to overtime payment and for Saturday work shall be effective only during the period of the National Emergency; provided, however, that this establishment of this emergency rate shall not be used as a subterfuge to defeat the double-time provisions for Saturday work which would be in effect were it not for the National Emergency.

“The provision for time and one-half for overtime [18] and on Saturdays established for the duration of the National Emergency shall automati-

cally terminate whenever the President of the United States shall proclaim that such National Emergency no longer exists; thereafter, all over-time shall be computed on a double-time basis.

“Holidays shall be recognized by local Metal Trades Councils. When a recognized holiday falls on Sunday, the day observed by the Council shall be considered as a holiday and paid for as such.

“5. Shift Work.

Shift work will be permitted in all classifications without restriction on the following basis:

(a) The regular starting time of the day shift shall be eight (8) a.m., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with the agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a.m.

(b) The regularly established starting time of the day shift shall be recognized as the beginning of the twenty-four (24) hour work day period. When irregular or broken shifts are worked, overtime rates shall apply before the regular starting time and after the regular quitting time of the shift on which the Employee is regularly employed.

(c) First or regular daylight shift: An eight and a half ($8\frac{1}{2}$) hour period less thirty minutes for meals on the employee's time. Pay for a full shift period shall be a sum equivalent to eight (8) times the [19] regular hourly rate with no premium.

“Second Shift: An eight (8) hour period less thirty minutes for meals on employee’s time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

“Third Shift: A seven and one-half ($7\frac{1}{2}$) hour period less thirty minutes for meals on employee’s time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).

“(d) For work on any shift less than the full shift period, pay shall be the corresponding proportionate part of the pay for the full shift period, provided such amount be not less than the minimum pay prescribed in Paragraph 10 hereof.”

6. During the entire period of their employment by the defendant, each of the following named plaintiffs to wit:

EDWARD R. BIGGS
ACHILLES O. FOLEY
JOHN S. GARCIA
JOHN R. HECTOR
H. J. LUEDER
MARTIN M. MORENO
JAMES S. YATES

were compensated for all of the hours between their respective starting times at the beginning of their respective shifts and their quitting times at the end of their respective shifts except for one-half hour each day during which each of them was scheduled

to take a lunch period and for which one-half hour each day each of them received no compensation.

7. During the entire period of their employment by the defendant, each of the plaintiffs named in Paragraph 6 of these findings, were required by the defendant to and did spend his entire shift including the said one-half hour lunch period at his [20] place or places of duty in the performance of the duties for which he was hired by the defendant and was not excused or relieved therefrom for the purpose of taking lunch. Each of said one-half hour lunch periods constituted hours worked for which said plaintiffs received no compensation.

8. No evidence was presented by or on behalf of the following named plaintiffs to wit:

HERMAN BELIN

CHARLES W. CARNAHAN

M. E. ELLIOTT

ALVA A. EVANS

W. E. GARDNER

F. E. LAIRD

CHARLES J. LUNN

RICHARD N. PORTER

and as to them the Court finds that they did not work any hours in excess of 40 in a week for which they were not properly compensated.

8(a). None of the plaintiffs performed any activities either before their regular shifts began or after their regular shifts ended for which they were

not fully and properly compensated as required by the Fair Labor Standards Act of 1938. [22]

9. Certain of the plaintiffs named in Paragraph 6 of these findings worked on the day shift for all or some portion of their employment by the defendant following October 18, 1943 and the remaining plaintiffs worked on either the swing shift or the grave-yard shift during all of their employment by the defendant following October 18, 1943.

10. By stipulation between the parties entered into in open court, the parties agreed that the periods of employment and number of hours worked as reflected in defendant's records would be used as the basis of computing the compensation, if any, due to any of the plaintiffs. Pursuant to said stipulation, the parties have agreed that the following named plaintiffs worked on the day shift for all or some portion of their employment by the defendant from October 18, 1943 to their respective termination and that the following amounts are due each of the plaintiffs named in Paragraph 6 of these findings for the number of half-hour lunch periods worked by them on the day [21] shift in excess of 40 hours in a week and the Court finds, in accordance therewith, the following amounts due to the respective plaintiffs after whose name the amount appears:

Achilles O. Foley.....	\$210.90
John S. Garcia.....	37.80
John R. Hector.....	35.30
James S. Yates.....	573.88

11. Defendant's failure to pay to each of said plaintiffs the unpaid wages set forth after their respective names was in good faith and without reason to believe that such failure was in violation of the law.

12. The plaintiffs have employed Mohr & Borstein and Perry Bertram, attorneys at law, to represent them in this action, and said attorneys have rendered services to the plaintiffs of the reasonable value of \$600.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

1. Jurisdiction of this action is conferred upon the Court by the Act and by Section 24(8) of the Judicial Code (28 U.S.C., Section 41(8)), and nothing contained in Section 2, and particularly Section 2(d) of the Portal to Portal Act of 1947 (29 U.S.C., Section 252), deprives the Court of said jurisdiction.

2. Each of the plaintiffs was employed by the defendant from October 18, 1943 to and including the date of his respective termination in the production of goods for interstate commerce and in processes and occupations necessary to such production within the meaning of the Act.

3. The following named plaintiffs, to wit, Edward R. Biggs, Achilles O. Foley, John S. Garcia, John R. Hector, H. J. Lueder, Martin M. Moreno,

James S. Yates, performed activities for, at the request of, and under the direction of the [23] defendant, during their respective lunch periods, which said activities were compensable within the meaning of Section 2 of the Portal-to-Portal Act of 1947, by an express provision of the written contract in effect at the time of such activity between said plaintiffs, their bargaining representatives and the defendant.

4. Each of the following named plaintiffs is entitled to recover, of the defendant, the sum set forth after his name as and for unpaid overtime wages for each lunch period while he was employed by the defendant on the day shift from and after October 18, 1943 and which lunch period or periods represented hours in excess of 40 in a week

Achilles O. Foley.....	\$210.90
John S. Garcia.....	37.80
John R. Hector.....	35.30
James S. Yates.....	573.88

5. Said plaintiffs are not entitled to recover any additional sum as or for liquidated damages.

6. The defendant is entitled to credit against all of the half-hour lunch periods worked by any of the plaintiffs on the swing shift by reason of the half-hour premium paid to said plaintiffs pursuant to Paragraph 5(c) of the Collective Bargaining Agreement relative to "Second Shift" as set forth in Paragraph 5 of the foregoing Findings of Fact.

7. The defendant is entitled to credit against all of the half-hour lunch periods worked by any of the plaintiffs on the grave-yard shift by reason of the one hour premium paid to said plaintiffs pursuant to Paragraph 5(c) of the Collective Bargaining Agreement relative to "Third Shift" as set forth in Paragraph 5 of the foregoing Findings of Fact. [24]

8. Plaintiffs Edward R. Biggs, H. J. Leuder and Martin M. Moreno are not entitled to recover any unpaid overtime wages or liquidated damages by reason of the fact that their lunch periods were worked on the swing shift or on the grave-yard shift during their entire periods of employment and plaintiffs John S. Garcia and John R. Hector are not entitled to recover any unpaid overtime wages or liquidated damages for the portion of their employment worked by them on the swing shift or grave-yard shift.

9. Herman Belin, Charles W. Carnahan, M. E. Elliott, Alva A. Evans, W. E. Gardner, F. E. Laird, Charles J. Lunn and Richard N. Porter are not entitled to recover any unpaid overtime wages or liquidated damages for the reason that there is no evidence of their having worked overtime for which they were not paid.

10. Plaintiffs are entitled to recover of the defendant the sum of \$600, payable directly to Mohr & Borstein and Perry Bertram as and for attorney's fees for legal services rendered herein.

11. Costs to be awarded to the respective prevailing parties in the sum of \$. to the plaintiffs and \$. to the defendant.

Los Angeles, California, February 21, 1949.

/s/ WM. C. MATHES.

Approved as to Form February 15, 1949.

THELEN, MARRIN,
JOHNSON & BRIDGES,
SAMUEL S. GILL and
ROBERT H. SANDERS,

By /s/ ROBERT H. SANDERS,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 21, 1949. [25]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil Action No. 5875-WM

M. E. ELLIOTT, et al,

Plaintiffs,

vs.

JOSHUA HENDY CORPORATION,

Defendant.

JUDGMENT

This cause having come on regularly for trial before the above entitled Court, Honorable William C. Mathes, Judge presiding, on January 19, 1949,

the plaintiffs being present in person and by their counsel, Mohr & Borstein and Perry Bertram, by David L. Mohr and Perry Bertram, and the defendant being represented by its counsel, Robt. H. Sanders of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders and the parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted pre-trial memoranda of law, and having been fully heard, and the cause having been submitted

The Court, having made its Findings of Fact and drawn its Conclusions of Law, orders Judgment as follows:

It is ordered, adjudged and decreed that the following named plaintiffs have and recover of the defendant the sums set forth respectively after their names as overtime wages. [26]

Achilles O. Foley.....	\$210.90
John S. Garcia.....	37.80
John R. Hector.....	35.30
James S. Yates.....	573.88

It is further ordered, adjudged and decreed that the following named plaintiffs take nothing by their complaint herein:

HERMAN BELIN

EDWARD R. BIGGS

CHARLES W. CARNAHAN

M. E. ELLIOTT

ALVA A. EVANS

W. E. GARDNER

F. E. LAIRD

H. J. LUEDER

CHARLES J. LUNN

MARTIN M. MORENO

RICHARD N. PORTER

It is further ordered, adjudged and decreed that plaintiffs have and recover of the defendant the further sum of \$600 as and for attorneys' fees herein, payable directly to Mohr and Borstein, and Perry Bertram, attorneys for the plaintiffs; and

It is further ordered, adjudged and decreed that plaintiffs, Achilles O. Foley, John S. Garcia, John R. Hector and James S. Yates have their costs of suit incurred herein taxed in the sum of \$30.00 and that defendant have its costs herein taxed in the sum of \$. from the plaintiffs other than Achilles O. Foley, John S. Garcia, John R. Hector and James S. Yates.

Dated: February 21, 1949.

/s/ WM. C. MATHES,
Judge.

Approved as to Form February 15, 1949.

THELEN, MARRIN,
JOHNSON & BRIDGES,
SAMUEL S. GILL and
ROBERT H. SANDERS,

By /s/ ROBERT H. SANDERS,
Attorneys for Defendant. [27]

Judgment Satisfied 4/14/49. By flg sep satis of
Yates, Garcia, Foley, and for plfs attys fees.

EDMUND L. SMITH,
Clerk U. S. District Court. Southern District of
California.

By /s/ EDW. F. DREW,
Deputy.

[Endorsed]: Filed and entered Feb. 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendant, Joshua Hendy Corporation and
to Thelen, Marrin, Johnson & Bridges, Samuel S.
Gill and Robert H. Sanders, its attorneys and to the
Clerk of the above entitled court:

Notice is hereby given that Plaintiffs Edward
R. Biggs, John S. Garcia, John R. Hector, H. J.
Lueder, Martin M. Moreno, hereby appeal to the
Circuit Court of Appeals for the 9th Circuit from
the final judgment entered in this action on February
21, 1949.

March 18, 1949.

MOHR & BORSTEIN and
PERRY BERTRAM,

By /s/ PERRY BERTRAM,
Attorneys for said Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 22, 1949. [28]

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice is hereby given that Joshua Hendy Corporation, defendant in the above entitled action, cross appeals to the Circuit Court of Appeals for the Ninth Circuit from:

(1) That portion of the final judgment entered in this Court and entered in this Court on February 21, 1949, in Civil Order Book No. 56, page 150, which granted recovery to appellants for activities performed during lunch period.

Dated: April 11, 1949.

THELEN, MARRIN,
JOHNSON & BRIDGES,
By /s/ ROBERT H. SANDERS,
Attorneys for Defendant.

[Endorsed]: Filed April 13, 1949. [30]

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO COMPLETE AND DOCKET RECORDS ON APPEAL AND ORDER

For the reason that Joshua Hendy Corporation appellee and cross-appellant is obliged to proceed in this matter with the consent and pursuant to instructions of the United States Maritime Commission and it is anticipated that those instructions will affect the record to be prepared on an appeal and to date such instructions have not yet been received, although they have been requested.

It is stipulated by and between the appellants and cross-appellees on the one hand and the appellee and cross-appellant on the other by and through their respective counsel that the time for preparing the record and filing and docketing the same in the Circuit Court of Appeals with respect both to the appeal and to the cross-appeal be extended to June 9, 1949.

MOHR, BORSTEIN &
PERRY BERTRAM,

By /s/ PERRY BERTRAM,

Attorneys for Appellants and
Cross-Appellants.

THELEN, MARRIN,
JOHNSON & BRIDGES,
SAMUEL S. GILL &
ROBT. H. SANDERS,

By /s/ ROBERT H. SANDERS,

Attorneys for Appellee and
Cross-Appellant. [31]

ORDER

Upon the filing of the foregoing Stipulation and good cause appearing, therefore, the time for preparing, filing and docketing the record on an appeal and on the cross-appeal is hereby extended to and including June 9, 1949.

April 27, 1949.

/s/ WM. C. MATHES,

U. S. District Judge.

[Endorsed]: Filed April 27, 1949. [32]

[Title of District Court and Cause.]

DISMISSAL OF APPEAL BY JOHN S.
GARCIA AND ORDER

Appellant John S. Garcia hereby dismisses his appeal herein for himself alone and for no other appellant.

April 28, 1949.

MOHR, BORSTEIN and
PERRY BERTRAM,
By /s/ PERRY BERTRAM,
Attorneys for Appellant,
John S. Garcia.

ORDER

Upon the filing of the foregoing Dismissal of Appeal, it is hereby ordered that the appeal of John S. Garcia be and the same hereby is dismissed as to him alone but as to no other appellant.

May 9, 1949.

/s/ WM. C. MATHES,
U. S. District Judge. [33]

Received copy of the within Dismissal of Appeal this 6th day of May, 1949.

/s/ ROBERT H. SANDERS,
Attorney for Defendant.

[Endorsed]: Filed May 9, 1949. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered from 1 to 36, inclusive, contain the original Second Amended Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Pre-Trial Stipulation of Facts and Issues; Order on Pre-Trial Proceedings; Answer to Second Amended Complaint; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Notice of Cross-Appeal; Stipulation and Order Extending Time to File Record and Docket Appeal; Dismissal of Appeal by John S. Garcia; and Stipulation Designating Record on Appeal which, together with original reporter's transcript of proceedings on January 19, 1949 and Original plaintiff's Exhibit 1, original defendant's Exhibits A, E-1 and E-2, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 one-half of which has been paid by each of the appellants and cross-appellant.

Witness my hand and the seal of said District Court this 3rd day of June, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 5875-WM-Civil

M. E. ELLIOTT, et al.,

Plaintiffs,

vs.

JOSHUA HENDY CORPORATION,

Defendant.

Honorable William C. Mathes,
Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Wednesday, January 19, 1949

Appearances:

For the Plaintiffs: Mohr & Borstein, Esquires;
By David L. Mohr, Esquire and Perry Bertram,
Esquire.

For the Defendant: Thelen, Marrin, Johnson &
Bridges, Esqs.; By Robert H. Sanders, Esquire.

JAMES S. YATES

one of the plaintiffs herein, called as a witness by
the plaintiffs, being first sworn, was examined and
testified as follows:

The Clerk: Please state your name.

The Witness: James S. Yates.

(Testimony of James S. Yates.)

Direct Examination

By Mr. Bertram:

Q. Mr. Yates, in the questions I am about to ask you I am going to refer only to the period of your employment with Joshua Hendy Corporation following October 18, 1943. So, unless I indicate to the contrary that I am asking about some other period, you will direct your answers to the period following that date.

What was your occupation with the defendant corporation?

A. Foreman of the oxygen and acetylene plant.

Q. What were your duties in that capacity?

A. Well, the operation of the entire plant, two plants, [14*] was under my direct supervision; also, that I did physical work there besides the supervisory work.

Q. How many oxygen plants were there at the yard?

A. There was one oxygen plant.

Q. How many acetylene plants?

A. One acetylene plant in the shipyard.

Q. Each of those plants entirely supplied the whole yard for its oxygen and its acetylene, is that right?

A. The entire yard.

Q. Where did you obtain your supply of oxygen?

A. The oxygen was supplied by trucks from the Linde Air Products Co.

Q. How was it handled?

A. It was pumped out of the oxygen tank or

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of James S. Yates.)

truck into a holding tank, into a stand tank, and from there into my converters and created a vacuum of gas.

Q. How was the acetylene handled in the acetylene plant?

A. All the acetylene we received was carbide in 250-pound drums. It was discharged into the generators and by its own natural pressure piped out into the yard.

Q. In other words, you generated your own acetylene there at the plant from the raw materials?

A. From the raw materials; yes, sir.

Q. Mr. Yates, what are you claiming in this action?

A. The lunch period which we never did have. We worked [15] throughout our lunch period.

Q. Will you describe the circumstances of your employment with respect to your duties during your regular work period of your shift and if any were performed during your lunch period?

A. Well, we had the duties of the entire shift. At the noon hour we used to do our running repairs on our generator or, as generally the case, we were out of gas about that time so we re-charged during the lunch period in order to cut out these road-built air pressures.

Q. Let me go back a moment and ask you just how many men were under your immediate supervision?

A. Well, I had technical supervision over 36, but in my day shift I had an average of three men.

(Testimony of James S. Yates.)

Q. Where were those men stationed and what were they to do?

A. One man in the oxygen plant—I had four men, rather. Pardon me. One man in the oxygen plant, myself—I mean myself as one man, four men including myself—three in the acetylene plant and one in the oxygen plant.

Q. With the exception of the man at the oxygen plant, were your duties about the same as his or were they different in any way?

A. Well, he had just strictly the oxygen plant to handle. He was strictly an oxygen engineer and his duties would be to keep his eye on the equipment, unloading the tank cars. And, [16] incidentally, when a tank car was started to be unloaded, you could not break it off. It took about six hours to unload a car.

Q. Did you help in that operation?

A. Yes; I helped in that operation.

Q. Did you help in the operation of the oxygen plant itself? A. Oh, yes.

Q. In what way? What did you do physically in the operation of that plant?

A. Well, I changed from one converter to another. Cooling time we would switch over to a full converter.

Q. What was involved in changing from one converter to another?

A. You pump your liquid from your stand tank into your converter. It is a mere matter of turning on motors and opening and closing valves.

(Testimony of James S. Yates.)

Q. How close attention to the valves and equipment is required?

A. Very close, because you are handling an explosive.

Q. Can your equipment be left unattended?

A. No.

Q. During the shift is this the fact: That you and the other employee in the oxygen plant were the only men available on the day shift to watch the oxygen plant? [17]

A. Yes, sir; just the crew, because nobody else was trained to handle the equipment.

Q. Will you tell us what the fact is with respect to the operation of the acetylene plant?

A. The acetylene, we had a loading platform in the middle of the plant. We would dump our carbide into a hopper, we call it, run it up on the trolley to over the generators to be recharged, to re-charge the generator, which means you change the water in it, getting out your slush water from the previous charge, clean it, and then re-charge and set your machine all again.

Q. Did you, Mr. Yates, do the physical work in connection with that operation?

A. Yes; I was a working man.

Q. As well as the man under you?

A. I did the identically same work as any one man.

Q. And close attention is required to the acetylene equipment?

A. Very close.

(Testimony of James S. Yates.)

Q. What is the reason for that close attention?

A. Well, you have one of the most explosive gasses there is. We had four explosions all told down there, one very bad one and three minor ones. You can't walk away from acetylene. You have to watch it, especially the rate of output we were obtaining which was above the highest capacity of our equipment. [18]

Q. In addition to watching the gauges and adjusting the valves to correspond to the readings on the gauges, what else in a physical way is required to operate that plant, that is, what did you do physically?

A. You have a motor on each machine, a feed motor, which we made all our running repairs on ourselves.

Q. When you say "ourselves" do you mean that you did that?

A. The crew, yes; myself and the crew. Generally I handled the motors because I did not have any boys that I thought knew enough about it to handle that end of it; so I generally did the motor repair.

Q. In what way, if at all, did your duties during the lunch period differ from your duties during the rest of the shift?

A. Well, we had less stand-by time in the lunch period than we would during the shift. Sometimes during the shift we would have everything charged and we would have a pressure for 10 or 15 minutes.

(Testimony of James S. Yates.)

During the lunch time we worked hard all the time because that was our only chance to make these running repairs.

Q. Why was that your only chance, Mr. Yates?

A. The yard, of course, was not using the acetylene or the oxygen at that particular time; so it gave us a chance to re-charge, to make our repairs, you see, without using pressures on the gas. [19]

Q. Mr. Yates, did you bring your lunch to work on your shift? A. Yes, sir.

Q. Did you eat your lunch at some time or other during the shift?

A. During the shift any time we ate a sandwich now and a sandwich then.

Q. Will you describe the manner in which you did eat your lunch?

A. Generally when I was on the upper platform where I am watching these gauges and the operating run, I would take a sandwich then at that time. All our gauges were faced so you could look at them from one position, and stand by up there and look at the gauges to see if any machines were quitting on me.

Q. In eating your lunch and watching the gauges as you describe were you ever interrupted by the requirement of performing some manual work yourself?

A. Oh, yes; lay the sandwich down on my desk, go on about my job, picking it up later.

Q. How often did that occur?

(Testimony of James S. Yates.)

A. Well, it was quite often enough not to be rare, I would put it that way. It happened very often.

Q. Were you ever relieved of all your duties, Mr. Yates, for the purpose of eating your lunch?

A. No, sir. [20]

Q. Did you eat your lunch during the regular lunch period? A. Customarily not; no.

Q. Did you ever eat your lunch continuously? By that I mean this: From the time you started to eat your lunch were you able to complete your lunch in one operation?

A. There could be some time, but I am a rather light eater at noon, so I don't believe I ever ate lunch complete at one time that I remember.

Q. What I am trying to ask you, Mr. Yates, is this: Were there ever any times that you can now recall where you were able to sit down and complete your lunch without being interrupted by some of your duties?

A. No, sir; I can't recall a time that I was not on the alert. You see, when an acetylene plant shuts down that is your most dangerous period after you have your run going hard. When you have to shut down quick like you do at the noon hour, and the charger starts to regenerate, that is when you get your explosions. So consequently, during the noon hour you are watching more closely than you would be during your runs. [21]

(Testimony of James S. Yates.)

Q. Were you ever paid for the half hour lunch period you have described? A. No, sir.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Mr. Yates, you worked in the acetylene plant there for Calship from 1941 to 1943, did you not?

A. Yes, sir; from the beginning until the time I was relieved.

Q. You have had some 20-odd years' experience in acetylene plants, haven't you?

A. Roughly, yes, sir.

Q. As I understood, the lunch period that you were talking about during direct examination was the regular shipyard lunch period when you closed the acetylene plant down, is that right?

A. Yes, sir. We didn't close it down. The pressure was not being taken away from us. In other words, they were not using gas.

Q. And that was probably the most dangerous period of [22] the shift as far as the acetylene plant was concerned?

A. As far as the acetylene plant quick shutdowns of the machinery is the serious part.

Q. So customarily both you and your men would eat either before or after the regular shipyard lunch period?

A. We ate whenever we could. Some fellow might take a sandwich at 10:00 o'clock in the morning, another at 11:00.

(Testimony of James S. Yates.)

Q. I mean ordinarily you would not eat during the regular shipyard lunch period? A. No, sir.

Q. Because you needed all hands in the acetylene plant to take care of the machinery when it was shut down?

A. We needed them very badly then.

Q. You needed all of the employees in the acetylene plant and in the oxygen plant under you, and each of them were hourly rate men, were they not?

A. Yes, sir.

Q. All hourly rate men in the shipyard had a half hour lunch period, did they not?

A. Theoretically, yes, sir.

Q. You knew that there was a union contract covering all hourly men down there, did you not?

A. Surely.

Q. In fact it was a closed shop, was it not?

A. A closed shop; yes, sir. [23]

Q. You knew there were a lot of union stewards in that yard at all times, supervising the working conditions, did you not?

A. That is right—pardon me, sir. There were frequently union stewards. Mr. Mickey McDonald came out to the yard on a complaint that we were working lunch hours, and he said, “There is a war on, Yates. Work your men through the lunch hour.”

Q. I didn't get what he said.

A. The union business agent, Mr. McDonald, came out the early part of the war when I had a complaint made against me by a shop steward, a boilermaker shop steward. It was none of his busi-

(Testimony of James S. Yates.)

ness, anyway. They cited me in for working my crew, and the business agent came out and said, "Work your crew. There is a war on. You got a gas plant."

Q. That is the business agent who told you that?

A. Yes, sir.

Q. Of the union? A. Yes, sir.

Q. And that was in '41 or '42, wasn't it?

A. Yes; just around shortly after Pearl Harbor, when we started getting bad overloads.

The Court: By "lunch hour" you mean lunch half hour?

The Witness: Lunch half hour; yes, sir.

Q. By Sanders: You state that you would have [24] pressures 15 minutes or so sometimes during the shift. Will you explain that a little more to us?

A. It just so happens occasionally you would have all your generators charged, and you might have a free period then where you did not have to recharge for 15 or 20 minutes. 15 minutes was about the maximum in the way we were setting our machines. And then, of course, you just stood by and watched your equipment.

Q. Did you let the men smoke in the plants there? A. No, sir.

Q. They could not smoke at all?

A. Absolutely not; in fact the law distinctly says you can't smoke within 75 feet, but we broke that rule by letting them smoke outside the wall.

Q. You mean you would let the men go out and smoke during the shift? A. Yes, sir.

(Testimony of James S. Yates.)

Q. Did all of the men eat their lunches in the plant, or did some of them go out in front of the plant some place to eat?

A. Oh, a man might walk out to get a sandwich or cigarette at our booth we had in front of the plant to smoke in, and might drop out for a smoke and eat a sandwich. We didn't all eat out there at the bench.

Q. I believe you stated that the gauges were all up on [25] a platform, consolidated so that you could see them yourself?

A. Yes, sir.

Q. Could your one man see all the gauges?

A. Well, no; one man on each side of the plant. We had a double plant. You couldn't see from one end of the plant to the other. We had a battery in the north and a battery in the south.

Q. And the gauges were not consolidated?

A. No. You could just see one battery at a time.

Q. And there was another man up there?

A. Another man had to be on the other side.

Q. Was it necessary to watch the gauges when the plant was shut down during the lunch period?

A. Yes; that was the most important time.

Q. During these pressures you speak about you still had two men?

A. Yes; direct orders from Mr. Kell and Mr. Alcott, both, at all times to be at least two men on the watch.

Q. You were paid by the week down there, were you not?

(Testimony of James S. Yates.)

A. No, sir; by the hour. Paid weekly, yes.

Q. You got a check every week? A. Yes.

Q. And that check, if you recall, had a stub on it, did it not? A. Yes. [26]

Q. It showed the hours you were paid for, over-time hours, if any, you were paid for?

A. Yes, sir.

Q. You do not recall ever being paid for lunch period time, do you?

A. No, sir; never was paid for.

Q. If you had been, you would have known it on each pay day; it would have shown up there?

A. Yes; I would have had another half hour.

Q. This lunch period situation you have testified to persisted throughout your employment down there, did it not? A. Yes, sir.

Q. From 1941 to 1945? A. Yes, sir.

Q. At the time you were performing these duties, Mr. Yates, is it not true that you understood that lunch period time you were not going to be paid for by your employer?

A. Yes; I understood that. We did that because we had the gas to get out and we needed to do the work; and it was just one of those things when the war comes along you had to get the gas out, and we got it out.

Q. You said you were never relieved from your duties for lunch to eat your lunch, you were a light eater. In fact, you never asked for any relief during the lunch period?

A. Couldn't have got it.

(Testimony of James S. Yates.)

Q. What? [27] A. Nobody to relieve us.

Q. In other words, you thought you should keep on working through the 30-minute lunch period whenever you took it, because the job needed it?

A. The job needed it. We were short-handed all the time. It was impossible to give relief because we didn't have enough men at any time.

Q. And the men in your crew, as to eating, did you have any designated time or make any kind of arrangements when a man could take some time off to eat his sandwich?

A. No; each fellow used his own judgment. If a man was hungry, he opened his lunch box, took out a sandwich and started to eat it.

Q. You could eat any time you wanted, practically? A. Any time you wanted to.

Q. Did you tell the men under you that they were going to get paid for their lunch period?

A. No, sir. They knew that the work had to be done regardless of what the shipyard paid us. In fact, we used to look forward to the lunch hour to catch up on things, you know, and get necessary work done.

Q. What was the union down there, Mr. Yates?

A. Operating engineers.

Q. They were a signatory to the collective bargaining agreement, were they not? [28]

A. Yes, sir.

Q. And they held regular union meetings, did they not? A. Yes, sir.

(Testimony of James S. Yates.)

Q. How often, do you know?

A. Well, every other week, every second week.

Q. Did you attend those meetings?

A. Periodically.

Q. As to yourself, Mr. Yates, on this lunch period claim you are now making did you ever make an actual complaint for pay for the lunch period prior to the filing of this action, with your employer?

Mr. Bertram: Just a moment at this point. If the court please, I have not objected to the line of questioning designed to establish, I presume, a waiver or an estoppel. The law is very clear that in this type of an action there can be no waiver or estoppel of the employee in his claim for the wages required to be paid by the Fair Labor Standards Act by reason of continuing to work and not receiving overtime, or continuing to work and not receiving overtime and failing to make a complaint. So any testimony as to whether or not complaints were made or whether or not the employees continued to work under these conditions would not be material to the action. On that ground we object.

The Court: This is cross examination.

Mr. Bertram: Yes, your Honor. [29]

The Court: There is a possibility of materiality apart from the question of waiver, I take it. There is no contention of waiver here?

Mr. Sanders: That is not my purpose, your Honor. My purpose is to show—

(Testimony of James S. Yates.)

The Court: Objection overruled.

Mr. Sanders: —construction of the contract they were performing on both sides, which is in issue before the court.

The Court: The objection is overruled.

Mr. Sanders: Will the reporter please read the question, or did you understand the question?

The Witness: I would like to have it read.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

A. No, sir.

Q. By Mr. Sanders: Were there any union stewards in the acetylene or oxygen plants?

A. Yes, sir. I happened to be one, myself, for a year.

Q. And what year was that?

A. I think that was in '42. Then they made me—they called me off of being a shop steward because I was also the superintendent or working foreman.

Q. Who were the stewards from 1943 on, if you recall?

A. The fellow that had the steam crane which they used before they had the boiler plant. He was chief shop steward. [30] I can't think of his name now.

Q. Is he a plaintiff in this case, do you know?

A. No, sir; not that I know of, at least.

Q. As I understand it, you supervised all three shifts did you not? A. Yes, sir.

Q. You normally were on the day shift all the time?

(Testimony of James S. Yates.)

A. The day shift was supposed to be my shift.

Q. But you would work on the swing some of the time?

A. Mr. Kell made a rule early in 1943, I believe, that on any shift, when they were short, the man from the day shift stayed over. The swing shift came in after the day. Any man short on the swing shift was replaced by a man from the day shift on a similar job. In other words, if the swing shift chief operator didn't come in, I had to work there and take his job. That was the close, hard and fast rule, the equivalent man from the day shift had to stay over.

Q. Are you acquainted or were you acquainted, rather, in your capacity as foreman of these plants with the procedure for authorizing overtime, over and above the regular shift work?

A. The fact is with Mr. Kell I didn't even have to say anything about it, just my next day's report: I worked so and so overtime a half day on the next shift, just notations. Our timekeepers knew that. [31]

Q. Did you have authority to work any of your men over and above the regular shift hours?

A. The only authority I had was under Mr. Kell, Mr. Kell's orders, in carrying out his orders; in other words, to have a man work over if we were short a man on the oncoming shift. That was his authority and I carried it out.

Q. Who was this union agent that told you—

(Testimony of James S. Yates.)

what was it, 1941 or '42—to work the men during the regular shipyard lunch period?

A. Mickey McDonald.

Q. Where was that, at a union meeting?

A. No; he come out to the yard.

Q. Did he give you any instructions as to when you were to let the men eat lunch? A. No, sir.

Q. He left that to your judgment?

The Court: Your answer?

A. Yes, sir.

Q. By Mr. Sanders: Did you ever give any of your men under you orders that they could not take 30 minutes for lunch period?

A. Well, sir, it never came up. It was just taken for granted you eat when you could. That was standard from the start of the plant, what you say, a plant custom, you know. I don't think there was very much question ever raised about [32] it.

Q. How often would these 15-minute pressure periods occur, just maybe once a week you would have one, or just every day?

A. Oh, you would get a pressure every shift sometime or other unless you were just absolutely running ordinary capacity all the time, which didn't happen some days when the shipyard was going extra heavy. You see, there is 12 generators and we were running them out in 15 minutes; so you can figure there would just be an occasional 15-minute break on that basis of operation.

Q. When you normally, you say, would eat your lunch on this platform? A. Yes.

(Testimony of James S. Yates.)

Q. In the acetylene plant?

A. Yes. That is in the plant before the explosion. After the explosion we had a different setup. We had a control board then. It was a different make of equipment, in which I could look at the control board and get all my pressures without looking at the machine, because each machine registered on the control board the rate of speed, the gas pressure gauge and how near empty it was.

Q. You could have gone outside to eat your lunch if you wanted to, could you?

A. No; not at the noon hour. I was too afraid of explosions. [33]

Q. Outside of the regular shift hours?

A. Oh, yes. I would break myself out to take a smoke, too. A man can't stay 25 hours around a machine. If you wanted to get out and get some air, you could.

Q. Did you give orders that the other men could not go outside to eat their lunch?

A. No. The only understanding we had, if a man was going to take a smoke he would holler over to me or whoever was running the other generator, the engineer in charge, "I am going out for a smoke."

Q. Did it work out, as you recall, that the men would eat at different times each day, or did they more or less work into a regular time to have their lunch?

A. No; very irregular.

Mr. Bertram: What was that answer, please?

(Answer read by the reporter.)

(Testimony of James S. Yates.)

The Witness: I said the time of eating was very irregular.

Q. When you were hired by Calship, Mr. Yates, you were told what the working hours were and what the lunch period would consist of, were you not?

A. Well, they told me an eight-hour day at such and such scale.

Q. They told you about the lunch period, didn't they? A. No; they never brought that up.

Q. You knew about it, though? [34]

A. I knew any gas plant is a continuous operation, a big plant like that, and any gas man knows he is going to have an awful hard time getting a lunch hour in anywhere as a certain hour. You are working from the time you start until you finish. The element of danger is such there you can't afford to take a chance and walk off on it. It is your neck that is going to go first, and you are right in there.

Q. After you had worked there for several months and received your weekly pay checks, you know that no pay was being paid for the lunch period? A. Yes, sir.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Yates, you mentioned the name of Mr. Kell. Who is Mr. Kell or who was he?

A. Mr. Kell was the engineer in charge of maintenance, I think was his title, chief maintenance engineer.

(Testimony of James S. Yates.)

Q. That is Ed Kell, is it not?

A. Ed Kell, chief maintenance engineer; yes.

Q. And he was a superintendent over what portion of the yard?

A. He was of the oxygen plant, the acetylene plant, the compressor plant, the boiler room, the construction electricians, the maintenance electricians, and the oilers, [35] the apprentice oilers, he had Mr. Hill. I was under Hill. Hill was under Kell, and two or three other odds and ends.

Q. Did you receive any express instructions from Mr. Kell as to the operation of the acetylene or oxygen plants during noon hours?

A. Yes, sir; keep on the job. We knew before the last explosion, we knew for five weeks, that is, Mr. Kell and I alone knew, I tore down one of the machines because we had a light explosion on it. That was on a Sunday, and took the equipment down to Mr. Kell and showed him. I said, "We are due for a good one." He said, "Then, tear all of your machines down every Sunday, one after another and see if we can avoid it." And he said, "Stick right on the job, and how."

Q. Did he give you any instructions with respect to the work during the lunch period of the men under you?

A. Yes. He told us to stand by. Also, Mr. Dick Lidicott come down on several occasions.

Q. I was going to ask you who Mr. Lidicott is.

A. Mr. Lidicott was one of Mr. Kell's assistants.

(Testimony of James S. Yates.)

Q. He was immediately over you, was he?

A. Immediately over me; yes, sir.

Q. What were his instructions to you, if any?

A. To stick right in that plant through the noon hour. In fact, he used to come down a couple of noon hours to see if we were in the plant. [36]

Q. Mr. Yates, did you know a man by the name of Thomas C. Mills who was employed at Calship?

A. Yes, sir.

Q. In what capacity was he employed there?

A. I think he worked primarily in the compressor plant, first, and then I think, later on, he relieved on the steam pipe boiler plant.

Q. Do you know whether or not he was a member of the same union in which you were a member?

A. Yes, sir; he was a member of the operating engineers.

Q. Do you know whether or not his employment was governed by the same contract which governed your employment?

A. Yes, sir; identical.

Q. Did you say that he also worked in the oxygen plant?

A. No, sir. Mr. Mills never worked under me.

Q. Did he work in the acetylene plant?

A. No, sir. I think he worked in the compressor plant, though, and the boiler room. I am not so positive about the boiler room.

Q. In cross examination you said that you and the men under you on occasion could leave the plant, step outside and, you said, have a smoke; and Mr.

(Testimony of James S. Yates.)

Sanders asked you whether or not you could do that for lunch. Did you ever step outside the room to eat your lunch?

A. Oh, I guess on a summer day I have eaten a sandwich [37] out in front. I wouldn't remember offhand.

Q. How long could you remain outside of that plant at any one time?

A. Well, a man would either go to the "head" or take a cigarette. That is about the time we allowed them. So, roughly speaking, a man could break out for a cigarette and be gone, say, five minutes.

Q. Were any provisions made to relieve either yourself or any of the men working under you for a full half hour lunch period? A. No, sir.

Q. For a definite lunch period of a given duration?

A. No, sir. We didn't have any at all. We had no relief whatsoever because we didn't have enough men to handle a relief.

Q. Did Mr. Foley work under your jurisdiction?

A. No, sir. Mr. Foley worked at the compressor plant.

Q. And Mr. Moreno?

A. Mr. Moreno worked for me.

Q. Were his conditions of employment substantially the same as yours with respect to lunch periods? A. Yes, sir.

Mr. Bertram: That is all, Mr. Yates.

(Testimony of James S. Yates.)

Recross Examination

By Mr. Sanders:

Q. Mr. Kell, as I understand it, told you to keep a [37-A] full crew there during the regular shipyard lunch period? A. Yes, sir.

Q. He did not tell you you were not to eat your lunch at some other time during the shift, did he?

A. To the best of my knowledge, I don't think I have ever had a conversation whatsoever with Mr. Kell as to the lunch hour, as to the best of my knowledge.

Q. That was not discussed; he just wanted you to keep a full crew there?

A. Yes, sir, regardless.

Q. Well, let me summarize it. Mr. Kell's orders were, then, that during the regular shipyard lunch period he wanted you to be sure and have the full crew there? A. Yes, sir. [38]

* * *

MARTIN MORENO

a plaintiff herein, called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Martin Moreno.

Direct Examination

By Mr. Bertram:

Q. Mr. Moreno, in the questions I am about to ask you, as with the other men, I am asking with

(Testimony of Martin Moreno.)

reference to the period following October 18, 1943, and I want you to direct your answers to that period of time while you were employed by California Shipbuilding Corporation. What was your job at that shipyard?

A. Well, I was a general utility man.

Q. Will you keep your voice up so that we can hear you this far away?

A. Yes. A general utility man.

Q. What duties did you perform?

A. I was an operator engineer.

Q. And where did you perform those duties, Mr. Moreno?

A. Well, different places in the yard, especially in the acetylene plant is where I put in about two years, a little over two years there.

Q. Was that after October of 1943 in the acetylene plant? A. I believe so. [58]

Q. Did you work under Mr. Yates?

A. Yes.

Q. What shift did you work on?

A. I was on swing shift.

Q. Can you describe your duties for us while you worked in the acetylene plant?

A. Well, there were 12 generators, you know, six on each side. They had one man on one side and I was tending to the other six.

Q. Each man was in charge of six of those 12 generators? A. Yes.

Q. What did you do while in charge of the generators?

(Testimony of Martin Moreno.)

A. I was operating the six generators.

Q. Can you tell us what that requires you to do? How did you operate six generators?

A. Well, it is all mechanical. It is run by carbide and you would have to maintain the carbide in it. For instance, 500 pounds of carbide would generate four and one-half cubic feet of gas, and each generator was putting out about 12,000 cubic feet an hour.

Q. So, then, I take it you assisted in loading carbide into the generators?

A. No. When we operate the generators that is opening them up and flushing them out after the 500 pounds of carbide would be over. [59]

Q. Did you have gauges on the generators to tell you when the gas pressure has reached the desired force? A. Yes.

Q. When that happens what do you do? What did you do?

A. Well, I didn't understand that. Did you say that when the generator would be out; is that what you are referring to?

Q. Yes.

A. Yes. There was on each generator, there was sort of a squeal as a danger point, see, and it was dangerous.

Q. Well, let me ask you this, Mr. Moreno: Were there any periods of time during your shift where you could leave the generators unattended?

A. No; not during my shift nor no other shift, I don't believe.

(Testimony of Martin Moreno.)

Q. Were you relieved of your duties for the purpose of taking lunch at any time during your shift?

A. No.

Q. Did you have any lunch period assigned to you, Mr. Moreno?

A. Well, we did, we did; and during that time we had to stand by and watch our gauges.

Q. You understood that there was a definitely scheduled lunch period for all of the employees in the yard; you knew that, didn't you? [60]

A. Well, yes.

Q. Were you able to take that lunch period off from your duties for the purpose of eating lunch?

A. No, no; you couldn't, you couldn't.

Q. Were you given any other time during the shift in which you had no duties to perform, in which you could eat your lunch? A. No.

Q. Did you take a lunch to work with you, Mr. Moreno? A. Yes, sir.

Q. And did you eat it on the job?

A. On the job.

Q. Will you describe the manner in which you ate your lunch during your shift?

A. Well, I recall several times, many times, we just had to go back and forth, that is during the lunch period, the so-called lunch period, because during that period that was the dangerous point, the dangerous time.

Q. Why was that?

A. Because the gas inside the generator would build up.

(Testimony of Martin Moreno.)

Q. And were there other times during the shift where you could take a half hour off for lunch?

A. No.

Q. What sort of duties did you perform during the lunch period that was assigned to the other employees of the yard? [61]

A. Well, we had to do a little maintenance work there, too, back and forth.

Q. Did you continue to generate gas during the lunch period?

A. Well, you see, there were, like I stated, there were two men, one on each side, see; so we would just run back and forth. One guy would run down. It was a madhouse.

Q. Let me ask you this, Mr. Moreno: Were you ever able to finish your lunch at one sitting, from the time you started it to the time you ended it, without being interrupted by some duties?

A. No.

Q. I take it by that you mean you ate your lunch piece-meal during the shift?

A. No, sir. No. I beg your pardon. I watched the generator and I had a sandwich in one hand and checking the gauge with the other, see.

Q. Did you ever receive any instructions from anybody in authority over you as to the manner in which you could take your lunch? A. No.

Mr. Sanders: What was that answer?

(Answer read by the reporter.)

(Testimony of Martin Moreno.)

Q. By Mr. Bertram: Were you ever paid for half hour lunch period? [62] A. No.

Q. Were your duties any different during the half hour lunch period assigned to the other employees in the yard than they were during the rest of your shift?

A. Well, we had our duties to do in the acetylene plant, and that was our job there.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Where did you eat your lunch?

A. Well, I ate my lunch in the acetylene plant.

Q. In the summertime you ate outside, possibly?

A. Well, you couldn't.

Q. You said you could not?

A. You could not.

Q. Why couldn't you?

A. An operator had to take care of those generators during the lunch period.

Q. You ate your lunch every day, Mr. Moreno?

A. Why, sure, on the job.

Q. Did anybody tell you you could not have eaten outside of the acetylene plant if you wanted to?

A. Well, supposing I did go outside, those generators would blow up. There was the biggest possibility there.

Q. I do not believe you understood my question. My [63] question was: Did anybody tell you, Mr.

(Testimony of Martin Moreno.)

Moreno, over you, that you could not go outside the acetylene plant to eat your lunch?

A. I don't think so.

Q. You do not understand the question?

The Witness: No. Will you repeat that again, please?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. No.

Q. (By Mr. Sanders): You stated on direct examination, Mr. Moreno, that you were assigned a lunch period. Now, my question is: What period was that that you were assigned for lunch?

A. Well, at any time, I guess.

Q. Who assigned that to you?

A. Mr. Yates, I guess.

Q. How many were there in the acetylene plant on your shift?

A. There was about three men, I guess.

Q. Whereabouts in the acetylene plant would you eat your lunch, down at the desk?

A. Well, no; around the generators; sometimes at the desk.

Q. Were you told by anyone, Mr. Moreno, that you could not take 30 minutes for your lunch period? [64]

A. No.

Q. But you were told that all of the hands in your crew were to be in the plant, working during the regular shipyard lunch period, isn't that right?

A. Yes.

(Testimony of Martin Moreno.)

Q. That was the dangerous period?

A. Yes.

Q. That 30 minutes?

A. Yes. We had to—well, I will tell you. Mr. Yates, he was acting chief engineer there at the plant, and we had to do maintenance work, too.

Q. So you would have your lunch either before or after the regular shipyard lunch period?

A. Well, in between.

Q. But you could not during the regular shipyard lunch period?

A. No. Any hour when we had time. Sometimes I would not eat at all, couldn't. That was a dangerous job.

Q. You say some days you would eat no lunch at all? A. That is right.

Q. Because you were not hungry?

A. No; there was too much to do.

Q. You mean somebody told you: "Moreno, you can't take time off to eat your lunch today"?

A. Well, you see, we had several fires out in the yard, [65] too, you know. We had to——

Q. No. My question, Mr. Moreno: Did Mr. Yates or any of your lead men or foremen ever tell you: "Now, Moreno, today you can't eat your lunch"?

A. Yes.

Q. Who was that, Mr. Yates?

A. Well, Yates and them did tell us not to eat our lunch. We had to divide our time in there.

Q. Well, who was it that told you that, Mr. Moreno?

(Testimony of Martin Moreno.)

A. Well, nobody told us that we couldn't eat.

Q. Nobody told you that?

A. But we had to do our job and eat at the same time mostly.

Q. Did you attend your union meetings?

A. Yes.

Q. Was there any discussion there of the fact that you thought you were not getting enough time to eat your lunch?

A. Well, you see, that was during the war times and there was—I think there was over 60,000 people working there in the shipyard, and it was difficult for the unions to go into such matters sometimes.

Mr. Sanders: I move to strike all of his answer as not responsive to the question, your Honor.

Mr. Bertram: Your Honor, I believe it is responsive. In his own way he answers that question to the best of his [66] ability.

The Court: Motion denied. You may press for a further answer if you desire.

Q. By Mr. Sanders: You attended your union meetings? A. Yes.

Q. What did you do about this lunch period, if anything?

A. Well, we didn't bring that up because I really believed it was like a duty that I had to perform. That was during the war. Nobody to talk to.

Q. You had stewards, union stewards in your acetylene plant?

A. Yes; but they were awful busy. You call one

(Testimony of Martin Moreno.)

down and you wouldn't see him for two months sometimes. They were pretty busy.

Q. When you were eating your lunch, Mr. Moreno, as I understand it, you would watch the gauges? A. Yes.

Q. And during the balance of your shift you were working on these generators?

A. Well, yes; in between, all kinds of work.

Mr. Sanders: No further questions.

Mr. Bertram: That is all, Mr. Moreno.

The Witness: All right. [67]

* * *

EDWARD R. BIGGS

one of the plaintiffs herein, called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Edward R. Biggs.

Direct Examination

By Mr. Bertram:

Q. Mr. Biggs, following October, 1943 what was your job at the shipyard of California Shipbuilding Corporation? [68]

A. I was classified as sub-foreman in the warehouse 2.

Q. What were your duties as sub-foreman?

A. I was in charge of the parts department at the warehouse.

(Testimony of Edward R. Biggs.)

Q. Was that parts department located in a warehouse?
A. That is right.

Q. And how many men did you have working under you?

A. It averaged from 12 to 15 I would say.

Q. What were the nature of your duties, Mr. Biggs?

A. Supervising them and issuing orders and okaying authorized signatures, checking signatures to see that they were authorized.

Q. That is with respect to requisitions for parts out of your warehouse?
A. That is right.

Q. Mr. Biggs, will you try to keep your voice up so we can hear you? What are you claiming in this action, Mr. Biggs?

A. Lunch period, a half hour lunch period.

Q. Did you perform duties during the half hour lunch period that was assigned to the other employees of the yard?
A. Yes, sir.

Q. What duties did you perform?

A. Issue parts, make out the requisitions for the parts, [69] and also search for the parts. That was the first procedure.

Q. Were those also some of the duties that you performed during the regular portion of your shift?

A. That is right.

Q. Mr. Biggs, were you assigned any other period during the shift in which to eat your lunch?

A. No, sir.

Q. At any time during your shift were you

(Testimony of Edward R. Biggs.)

relieved of your duties for the purpose of taking your lunch? A. No, sir.

Q. During the lunch period did the employees who were under your supervision remain on the job along with you?

A. That was during the lunch period, you say?

Q. Yes. A. No; they didn't.

Q. Were you alone in charge of the parts department and manning the parts department during the lunch period?

A. Oh, occasionally one of the employees would be there, two or three of them sitting around, maybe, on cartons or boxes, wherever they could sit down there.

Q. What were the occasions for you performing duties during that lunch period while the other men in your department were off duty?

A. I was in charge of the department and was responsible that the authorized people would be in the department, and that [70] requires that we watch to see that nothing be taken out but what was supposed to be taken out, without requisition.

Q. Did any of the employees in the yard come to the parts department during the lunch period in order to obtain parts? A. Yes, sir.

Q. Did you bring lunch to work with you, Mr. Biggs? A. Yes.

Q. Did you generally eat it on the job?

A. Yes.

Q. Will you describe the way in which you ate your lunch?

(Testimony of Edward R. Biggs.)

A. I had a small box there in one corner of the warehouse, the parts department there. I had a desk. I usually started to eat my lunch and I never did get a complete lunch eaten at one sitting. In other words, I would eat a sandwich, someone would come in or there would be a phone call or I would have to go hunt for a part, because there were certain employees in the yard, maintenance men there that came in at that time to get the parts.

Q. Can you at this time recall any occasions, Mr. Biggs, in which you were able to eat your lunch uninterrupted by some duties? A. No.

Q. Did you receive any instructions from anybody in authority over you with respect to your taking time off for lunch? [71]

A. I didn't quite understand the question.

Mr. Bertram: Would you read it, Mr. Reporter? If it is not clear, I will reframe it.

(Question read by the reporter.)

Mr. Bertram: Is that question clear? If not, I will reframe it.

The Witness: I don't believe I quite get what you mean.

Q. Who was over you? A. Mr. Blackert.

Q. Did you ever have any discussion with him regarding your taking your lunch or regarding your working during your lunch period, either one?

A. My instructions were that I had to be there in the department at all times.

Q. Did Mr. Blackert give you those instructions? A. That is right.

(Testimony of Edward R. Biggs.)

Q. When was that?

The Court: You were told you could never leave the warehouse?

The Witness: Not exactly you couldn't leave the warehouse, but at the lunch hour I was the only one that was really there at the time.

The Court: Did your superior tell you to stay there during the lunch hour every day?

The Witness: He made it clear that I was not supposed to [72] leave.

The Court: What did he say?

The Witness: Well, he said, "You are responsible." When I first went in the department I didn't have so many employees at that time, but he said, "You are responsible for this department and to watch it at all times."

Q. (By Mr. Sanders): Did you ever ask anybody in authority over you whether you could take 30 minutes off for lunch like the other employees did? A. No.

Q. Did you ever have any conversation with anybody in authority over you with regard to that at all? A. No.

Q. Were you ever paid for the half hour lunch period? A. No, sir.

Q. During the time that you were eating your lunch were there occasions to answer the phone?

A. Yes, sir.

Q. And what sort of phone calls would be made to you, for what purpose?

(Testimony of Edward R. Biggs.)

A. Somebody in the yard would be calling to see if we had a certain part for a certain piece of equipment.

Q. Was that phone on your desk where you were eating your lunch?

A. That is right. I would have to go to that section [73] to see if we had that particular part and then go back and answer on the phone again.

Q. What would happen if somebody came to the counter to requisition a part while you were eating your sandwich?

A. We would wait on them.

Q. And leave your lunch?

A. That is right.

Mr. Bertram: You may cross-examine.

Cross-Examination

By Mr. Sanders:

Q. You were a sub-foreman during this period from October, 1943 up to your termination, is that right, Mr. Biggs? A. That is right.

Q. And you had approximately 12 to 15 men under you all that time?

A. Approximately, yes.

Q. You are only claiming for the lunch period in this action?

A. That is all. I got paid for that other period.

Q. You are claiming the lunch period for each and every day of your employment since October, 1943, is that right? A. That is right.

Mr. Bertram: Mr. Biggs, I can hardly hear

(Testimony of Edward R. Biggs.)

you even from here. Will you try to speak a little louder?

The Witness: All right. [74]

Q. (By Mr. Sanders): I believe you stated your lunch was interrupted every day?

A. That is right.

Q. Some way or another. When was it Mr. Blackert told you you were responsible for your department at all times?

A. When I started on the swing shift.

Q. Well, when would that be, approximately?

A. It was in February, 1943 or approximately around in there.

The Court: You did work the swing shift?

A. That is right.

Q. All during this period you are telling about?

The Witness: That is right.

Q. (By Mr. Sanders): Refreshing your recollection, Mr. Biggs, your records, company records, show you were on the swing shift after October, 1943 on?

A. I could be wrong about that on those dates.

Q. But you recall it was at the time you went on the swing shift.

A. That is right.

The Court: Do you know whether these people who came in and disturbed you every day to get parts claimed overtime for the time they spent in disturbing you?

The Witness: I believe there was some employees that might have been on a different lunch hour. I am not sure as to that. [75]

(Testimony of Edward R. Biggs.)

The Court: The entire plant did not have the same lunch period?

The Witness: There might have been a few maintenance men that had a different lunch period.

Mr. Sanders: I did not get that.

(Last part of record read by the reporter.)

Q. You had authority to stagger the lunch period of the men under you if you had wanted to do so, didn't you? A. I never did.

Q. But you could have done it?

A. I could have; yes, sir.

Q. And you could have had some men working during the regular shipyard lunch period to service these men at that time, couldn't you?

A. I don't get just what you mean.

Q. You had to give service in your department, the parts department, at all times throughout the shift, as I understand it? A. That is right.

Q. And the demands were very light during the regular shipyard lunch period; you figured you could handle it by yourself and let all 12 or 15 men off, is that right?

A. I handled it by myself, yes. Nobody else ever worked during the lunch hour that I recall.

Q. You did not want to ask them to? [76]

A. I never did.

Q. Blackert did not tell you that you could not take 30 minutes off for lunch, did he?

A. Not in those words; no.

Q. In fact there were no instructions given to

(Testimony of Edward R. Biggs.)

you as to when to take your lunch period, were there? A. No.

Q. Speaking of yourself now, not your crew?

A. No.

Q. You recall my taking your deposition in April, 1947, don't you, Mr. Biggs? A. Yes.

Q. Well, I want to read a portion of that to you and refresh your recollection on these days that you claim you were always interrupted during your lunch.

The Court: I would suggest you put the document in front of the witness and let him read it first, and then you may put your question for the record.

Mr. Sanders: May I have the original?

Q. Will you read page 13, commencing with the question on line 13 of your deposition, to and including your answer on page 14, line 5?

The Witness: Do you want me to read it out loud?

The Court: Read it to yourself first and then counsel will ask you a question with respect to it.

The Witness: This question 13?

(Mr. Sanders indicating to witness in transcript.)

Q. (By Mr. Sanders): Does that refresh your recollection, Mr. Biggs, that there were days, more than once a week, when you would have no interruptions at all during your lunch period?

A. Well, there was days, naturally, to be fair about it. There was a day once in a while, maybe,

(Testimony of Edward R. Biggs.)

nobody would come in, but it was so rare that I was interrupted practically every day by either a phone call or a customer coming in to be waited on.

Q. When I asked you in your deposition, your answer was, on page 14: "Oh, it would be more than once a week, I would say, to be fair about it," that you would not be interrupted. And is that still the situation, or do you think it was maybe only once a month now?

A. No; I wouldn't change it any.

Q. Well, how often would you say that you would have your lunch period to yourself?

The Court: He said he would not change it; once a week.

Mr. Sanders: More than once a week was his answer. Now I am asking him to give a better estimate if he can, your Honor.

A. Well, it is pretty hard to say. As long as it was "more than once a week," maybe twice a week. It is more, I guess, than anything else. I didn't keep no permanent record [78] on it.

Q. What were your duties other than during this lunch period; what work did you do?

A. I was supervising employees, seeing that they put the stock away. We were in the process of making a catalog and their merchandise had to be out on the shelves according to the catalog. They were helping to do that, too, along with issuing the parts.

Q. Did you issue the parts during other than the regular lunch period? A. Yes, sir.

(Testimony of Edward R. Biggs.)

Q. You did not have any of these men under you doing that work? A. Yes.

Q. How many?

A. Oh, I should say six to eight of them probably.

Q. How many?

A. Six to eight. Any of the employees could issue the parts, though, if I told them to do it.

Q. You would help in case you got real busy, is that the idea? A. Yes.

Q. And mainly, your job other than the lunch period was supervising these men and cataloging and putting the parts away, etc.? [79]

A. Yes.

Q. You did not do any supervision work during the lunch period, did you? A. No, sir.

Q. Did you ever make any objections to anyone above you that you were not being given your lunch period, Mr. Biggs; that you were required to work during your lunch period? A. No, sir.

Q. Did you ever file any objections with your union or see your union steward about that matter?

A. I don't recall ever seeing a union steward.

Q. Were you a member of the union?

A. Yes, sir.

Q. You had meetings? A. Yes, sir.

Q. While you were employed down there?

A. Yes, sir.

Q. You knew there was a union contract with Calship, didn't you? A. Yes, sir.

(Testimony of Edward R. Biggs.)

Q. But you did not know they had stewards in the yard?

A. No; I didn't see them. I knew there were stewards in the yard, yes; but I never did see one.

Q. You never did look one up? A. No.

Q. Isn't it true that in some of these spare parts places in the shipyard the foreman would split his shift up for the lunch period?

A. Do you mean in the——

Q. For—have a portion of the crew eat a half hour before the lunch period and part of the crew eat at the regular period?

A. I never heard of that in that warehouse.

Q. You never heard of that?

A. In that warehouse.

Q. As I understand it, you felt that you were responsible to stay on the premises there or in the warehouse during the lunch period because you were foreman? A. That is right.

Q. And because Blackert said, "On this shift you are in charge of the whole area here"?

A. That is right.

Mr. Bertram: What was the answer?

The Witness: "Right".

Q. (By Mr. Sanders): Now, I will ask you, Mr. Biggs, if Mr. Blackert did not tell you, did he: "Mr. Biggs, you are not to leave this area during your lunch period"?

A. Not in those words. He said at all times to be in the department.

(Testimony of Edward R. Biggs.)

Q. That you were in charge and responsible at all times? [81] A. That is right.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Biggs, did you have any authority to leave the parts department in charge of one of the employees under you while you were off for a half hour?

A. I had a man that could take over, yes.

Q. Did you ever do that? A. Yes.

Q. On how many occasions did you do that?

A. Oh, I don't know how many. I wouldn't say as to that.

Q. Was that for the purpose of you taking your lunch for a half hour? A. No, sir.

Q. What was the purpose of it?

A. I might run over to the electrical department or some other department that would call me on some part, maybe, and I would go over to check. They had some piece of machinery broken down, they couldn't exactly tell you what they wanted, but if you went over and saw the part and come back, you could find it much easier.

Q. In other words, if you were summoned out of your department by someone else, then you could leave it in charge [82] of your assistant?

A. That is right.

Q. Did you have any way of knowing as the lunch period began and you arranged for your

(Testimony of Edward R. Biggs.)

Q. Lunch whether or not there would be one or a dozen or no interruptions during that lunch period?

A. No.

Q. You were available there for whatever came up?

A. That is right.

Mr. Bertram: That is all, Mr. Biggs.

Recross-Examination

By Mr. Sanders:

Q. The other men in your crew, it is true some of them would eat lunch there in your office with you, wouldn't they?

A. Yes.

Q. And it is true that sometimes during the lunch period they would help you issue parts if you were rushed?

A. Yes; on occasion.

Mr. Sanders: No further questions.

The Court: You may step down, Mr. Biggs.

Mr. Bertram: Mr. Hector.

JOHN R. HECTOR

one of the plaintiffs herein, called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Please state your name. [83]

The Witness: John Richard Hector.

Direct Examination

By Mr. Bertram:

Q. Mr. Hector, in October of 1943 and following

(Testimony of John R. Hector.)

that time what was your job at the shipyard of California Shipbuilding Corporation?

A. Maintenance foreman.

Q. What were your duties as maintenance foreman?

A. We had charge of all the upkeep of the yard, oxygen, acetylene, air and water.

Q. When you say you had charge of that type of equipment what did you actually do with it?

A. We had to repair all this equipment. Some of it was stationary and some of it could be moved around, and the stationary equipment had to be repaired when the yard was down, like during the lunch period.

Q. Did you have supervision over any of your employees in your department?

A. Yes. My employees ranged from six to fourteen, I believe, somewhere in that capacity.

Q. On what shift? A. Graveyard.

Q. Was that during the entire time after October 18, 1943? A. Yes. [84]

Q. What are you claiming in this action, Mr. Hector?

A. The half hour lunch period, and there was a time when they paid us for coming in early and going home late to make the exchange with the on-coming and outgoing foreman, and they paid us for that for a while but for a while they did not. So, if there is any of that left.

Q. So you are also making a claim for that time?

Testimony of John R. Hector.)

A. They can look it up in the records of Cal-hip.

Q. Referring to the lunch period, Mr. Hector, you performed duties for your employer during the lunch period that was regularly assigned to the other employees in the yard? A. Yes.

Q. What duties did you perform?

A. Well, we had emergency repairing mostly.

Q. Emergency repair of what?

A. On the hose, oxygen, acetylene hose, and the air hose and water hose.

Q. Do you do that repair work at a fixed place in the yard, or were you wandering all over the yard?

A. Well, we had a shop. A lot of it was stationary in the plate shop and pipe shop, copper shop, and all over the yard was stationary hose.

Q. So you would have to go to the place where the equipment was located in order to make the repairs, is that it? A. That is right. [85]

Q. Did you have such repair duties to perform every lunch period?

A. Mostly, practically every lunch period; yes.

Q. Were there some lunch periods that you worked there where you did not have any duties to perform?

A. Well, there might have been a few.

Q. At the times, Mr. Hector, when you had duties to perform during the regular lunch period were you given a lunch period at some other time during the shift? A. Well, no; not exactly.

(Testimony of John R. Hector.)

Q. Will you describe what the situation was?

A. Well, whenever the men had a chance to eat their lunch, they would eat their lunch, but generally at the lunch period we had most of the work. The work would pile up at the lunch period due to the fact that the yard was shut down and this stuff could be repaired.

Q. Were you ever relieved of your duties for a half hour either during the regular lunch period or at any other time during the shift for the purpose of eating your lunch?

A. No. There was no one to relieve me.

Q. When you say you started to eat your lunch, say there was a lull in your duties and you thought that you could eat your lunch, were you ever able to continue to eat your lunch until you had completed your lunch without being interrupted by duties? [86]

A. I didn't bring any lunch. I didn't eat any lunch.

Q. Was that a matter of your own choice?

A. That is right.

Q. And did you have any half hour period or any designated period of time assigned to you where you were free to do what ever you wanted without having to perform any duties?

A. Well, as a foreman, I believe you are on duty most of the time. There is very rarely a time that you are not doing something. If it is not physically, it is mentally. [87]

(Testimony of John R. Hector.)

Q. I believe you stated there would be some lunch periods that you would have nothing to do; isn't that right, Mr. Hector?

A. That is right, but we were always subject to call on account of the fire department. We had to follow the fire department whenever the fire department went out; and if there were any damage done anywhere, we had to go pick it up right away.

Q. You mean the fire department called you direct or somebody over you?

A. We had orders that whenever the fire department went out we were to follow them.

Q. Where were you then, right next to the fire department?

A. Not exactly. We was in the central tool room.

Q. What about the crew under you, then, they had to go [93] out, too?

A. That is right.

Q. Where did you permit them to eat their lunch? A. Wherever they could.

Q. Wherever they could?

A. That is right.

Q. Well, whereabouts in the area where you worked?

A. Yes; some of the men were on the ways, some were on the outfitting docks, and some were in the central tool room.

Q. And you would eat in those places, too?

A. I didn't eat lunch.

Q. What? A. I did not eat lunch.

(Testimony of John R. Hector.)

Q. Some of your men did not eat lunch, either, did they? A. Well, I guess not.

Q. Don't you remember?

A. I wouldn't say as to that; no.

Q. Some of the men on your crew did not take lunch, did they? A. I don't believe they did.

Q. They took their time off, didn't they?

A. Well, I wouldn't say as to that, either.

Q. You did not bother to check on that?

A. You couldn't be with all the men, you know.

The yard was quite big. [94]

Q. I am talking about the men in your crew.

A. Well, that is the men I think of. I had men on every way and outfitting dock.

Q. How many men did you have when you worked in those places where you worked?

A. I had two men in the shop.

Q. No, no.

A. Two in the shop. They were all under me.

Q. I mean you had two men in the shop where you worked?

A. I didn't work in the shop all the time.

Q. Where did you work?

A. I was out on the ship ways, plateshop, supervising work.

Q. You would go out and supervise the work during the shipyard lunch period? A. Right.

Q. Would the men take their lunch at that time?

A. No.

Q. You would let them eat later on?

A. Yes; if they could.

(Testimony of John R. Hector.)

Q. Did you ever tell them they could not take their lunch period? A. No.

Q. You were never given any orders to that effect where you? [95] A. No.

Q. Not to let the men eat?

A. No; not that they couldn't eat.

Q. You were never given any orders yourself, Mr. Hector, that you could not take your 30-minute lunch period, were you? A. No.

Q. Mr. Mowrey gave you some orders as to your lunch period, didn't he? A. Yes; he did.

Q. What were those orders?

A. Mr. Mowrey said any emergency work or any repair work that had to be done during lunch period, it had to be done.

Q. When did he give you that order?

A. I believe it was in 1940 on to the middle of 1943, somewhere.

Q. To the middle of 1943?

A. Somewhere after Mr. Mowrey took us over.

Q. Whereabouts was it he gave that order to you? A. In his central tool room.

Q. Who else was present?

A. Just himself and me.

Q. Whereabouts in the central tool room?

A. In our shop.

Q. By "our" do you mean your shop?

A. Yes. [96]

Q. Where *were* worked with the two men?

A. That is right.

(Testimony of John R. Hector.)

Q. Isn't it a fact, Mr. Hector, that he told you that on those occasions you were to take your lunch period later?

A. He says, "Take your lunch period if you can," yes.

Q. You mean he told you that if there was work to do, don't take time off for lunch?

A. If there is work to do, do it. We had the ship launching also, we had the equipment for the ship launching.

Q. Did Mr. Mowrey instruct you that you were not to take time off for lunch?

A. If there were emergency work; yes.

Q. By that, I mean not to get any time?

A. Mr. Mowrey didn't say that.

Q. He never said that at any time, did he?

A. No.

Q. Were you ever told by Mr. Mowrey or any of the other superiors that you were going to be paid for lunch period time? A. No.

Q. Or any of the men in your crew?

A. No.

Q. Who was the union steward in your crew?

A. I don't believe I had a union steward in my crew. He was on the graveyard.

Q. There was one on your graveyard shift? [97]

A. The boilermaker, I believe, but we were the only boilermaker division under the machinists.

Q. Can you estimate at this time what portion of your lunch periods while you worked down there that you would not be busy at all?

(Testimony of John R. Hector.)

A. No. We had something to do most every lunch period.

Q. You stated there were some lunch periods where you would have nothing to do.

A. Well, there were a few, I imagine, and on those occasions I was probably out looking over or checking over some other stuff in the yard.

Q. At Mr. Mowrey's orders?

A. No; not necessarily.

Q. On your own initiative?

A. That is right.

Q. How often would you say emergency work was required to be done during your lunch period?

A. Quite often.

Q. How often?

A. Practically every day there was something.

Q. Practically every day from October, '43 up to the time you terminated, is that your testimony?

A. That is right.

Q. And that emergency work would require 30 minutes or more time to repair? [98]

A. No; not always.

Q. Maybe just five minutes?

A. Well, maybe 10, 15, maybe 20 minutes. You never can tell about how long you will have to work there.

Q. Then after that work was done you would let your crew off for 30 minutes, wouldn't you?

A. No.

Q. How long would you let them off for?

(Testimony of John R. Hector.)

A. Well, whenever the regular work started again, they started up. Sometimes they worked straight through.

Q. Wouldn't you let your men off to eat some time during the shift?

A. If they demanded it; yes.

Q. You had no set lunch period, then, for your crew; just when they requested it you would let them off?

A. That is right.

Q. Otherwise you would let them work?

A. The regular lunch period was from 4:00 to 4:30, I believe.

Q. I do not think you understood me. I am not trying to trick you here. Is it your testimony you would only let the men in your crew eat lunch when they requested it; that otherwise you would force them to work throughout the shift?

A. I didn't force anyone to work.

Q. Unless a man requested the time off to eat his lunch, you would keep him on the shift; is that right, Mr. Hector? [99]

A. Not if there was time for them to eat lunch. I would let him eat lunch.

Q. And if there was not time, you would keep him on the job?

A. That is right.

Q. Who gave you those orders?

A. Well, the orders were to get all the emergency work done, all the repair work done and keep it going.

Q. Did someone above you give you orders, Mr. Hector, that you were to do the work and not per-

(Testimony of John R. Hector.)

mit a man to eat lunch at any time during the shift? A. No.

Q. You were never given any such order?

A. No; that is right.

Q. You knew the men were not being paid for the lunch period time, didn't you?

A. That is right.

Q. You knew that to do work other than regular shift hours had to be express overtime authority, didn't you? A. That is right.

Q. That is the only way a man could get paid for other than shift time, isn't that right?

A. That is right.

Q. Prior to Mr. Mowrey giving you this order about doing emergency work during the lunch period, I take it you [100] did not work during the lunch period, is that right?

A. Yes; we did some of it during the lunch period. There was quite a few occasions when men would bring in their small leakage holes in the hose they would have, owing to the shorter stuff, like that. The men would wait until the lunch period to bring those in and get them repaired.

Q. Isn't it true there would be some jobs that would come in during the lunch period that would only require the work of one of the three of you?

A. Possibly, yes.

Q. Then the other two could take time off, couldn't they? A. That is right.

Mr. Sanders: No further questions.

(Testimony of John R. Hector.)

Redirect Examination

By Mr. Bertram:

Q. Mr. Hector, you had several types of hose there; you had air hose? A. Right.

Q. Oxygen? A. Right.

Q. Acetylene? A. That is right.

Q. What else? A. Water [101]

Q. Anything else?

A. We had the big oxygen-acetylene lines going to the shops in that period to fix.

Q. Steam?

A. No; we had very little to do with steam.

Q. That was carried in pipes, wasn't it?

A. That is right.

Q. Mr. Hector, some of those hoses were main lines only and others were auxiliary lines taken off the mains? A. That is right.

Q. Could you give the court, if you know, an approximation of how many employees would be dependent on their continuous operation for their work on a main air hose, for example?

A. No; I could not. It would have to come through the records of the Calship, because we would have most of the burners and the chippers. Practically everyone that worked on the outfitting dock would be dependent on those lines.

Q. It would run up into the thousands, wouldn't it? A. Yes.

Q. Do you know now if you would have been permitted to let one of those air hoses remain un-

(Testimony of John R. Hector.)

repaired while your men ate their lunch if they requested to eat their lunch?

Mr. Sanders: I object to that as ambiguous, irrelevant and hypothetical. [102]

The Court: It is highly speculative, isn't it?

Mr. Bertram: It is speculative.

The Court: Sustained.

Q. (By Mr. Bertram): Your instructions, then, as I understand it, were to make the repairs as soon as any break occurred?

A. As soon as we got a call; yes, sir.

Q. Did you also have to make repairs of individual auxiliary lines leading, for example, to a piece of welding equipment or burning equipment?

A. That is right.

Q. Unless those repairs were made, the men or the equipment would be idle, would they not?

A. That is correct.

Q. Did you have enough men in your crew to perform all the repair work in the regular hours of the shift and allow 30 minutes off for everybody?

A. We didn't have as many men in our crew as they had in the other shifts.

Q. You say Mr. Mowrey was your supervisor?

A. That is right.

Q. You were on graveyard shift?

A. That is right.

Q. On what shift did Mr. Mowrey work?

A. Day shift, although I believe he had charge of all three shifts. [103]

(Testimony of John R. Hector.)

Q. Did you see him on your shift on any occasion?

A. Yes; occasionally Mr. Mowrey would come in early and see us.

Q. How often?

A. Well, he might come in once a week, twice a week. Generally about once a week he would be in.

Q. Would he remain on your shift during the entire shift or just come in before the shift?

A. No; he had other departments that he were looking after, so he would probably visit with us an hour or an hour and a half.

Q. In other words, when you saw him it would probably be about an hour before your shift was due to end and his shift to begin?

A. Generally, yes.

Q. Did you ever see Mr. Mowrey there during the lunch period of your shift?

A. Well, I can't say that I have.

Mr. Bertram: I have no further questions.

Mr. Sanders: Just one question.

Recross-Examination

By Mr. Sanders:

Q. On these occasions where you did not have to do any work during the lunch period what did you do?

A. Well, sir, there were times when I would have to go [104] out in the yard and kind of look the thing over. On the end of each way there were what they call a way valve for the oxygen and

(Testimony of John R. Hector.)

acetylene lines, and if the way was all shut down, you could listen to these water lines. If they were bubbling, you had to locate your way, then you would have to go and find that leak; and we were quite often doing that on the lunch period.

Q. I say, on the days when you were not doing that and were not doing anything what did you do?

A. Well, I was probably sitting by the telephone, waiting for a call.

Q. Just sit around the office there?

A. That is right. [105]

* * *

SAMUEL S. GILL

called as a witness by the defendant, being first sworn, was examined and testified as follows:—

The Clerk: Please state your name.

The Witness: Samuel S. Gill.

Direct Examination

By Mr. Sanders:

Q. Mr. Gill, you are a licensed and practicing attorney in the State of California? A. Yes.

Q. Associated with Thelen, Marrin, Johnson & Bridges? A. That is right.

Q. How long have you been with that firm?

A. Since the middle of 1943. [107]

Q. Have you been with the firm in Los Angeles for that period?

A. That is right; I have been in Los Angeles since August 20th, I think, of 1943.

(Testimony of Samuel S. Gill.)

Q. Did you have occasion to do any work for California Shipbuilding Corporation?

A. Yes.

Q. From 1943 on?

A. The firm was the general counsel for California Shipbuilding Corporation during the war years from 1943 through until the completion of the shipbuilding program.

Q. In the capacity of counsel for California Shipbuilding Corporation did you have occasion to confer with them as to labor matters and contract matters in relation to the shipyard?

A. Yes; I did.

Q. Were you acquainted with the contracts that were in existence between Calship and United States Maritime Commission under which they were producing ships?

A. Yes; I was acquainted with all those contracts. They changed from time to time the type of contract.

Q. Were you acquainted with the contract between the unions representing the Calship and Calship, the master labor agreement?

A. Yes; I was and I still am.

Q. I show you Plaintiffs' Exhibit 1 and ask you if you [108] recognize that?

A. Yes; this is a copy of the master contract between the shipyards and the unions represented by the Metal Trades Council. This particular contract here applied to all the shipyards, not only

(Testimony of Samuel S. Gill.)

Calship, but it was signed by Calship and also by the Unions, international unions that were involved in building ships.

The Court: That is throughout the United States?

The Witness: Throughout the western states, this particular contract applied. It applied to shipyards, in particular shipyards at Richmond, those at Oakland and Los Angeles.

The Court: The Pacific Coast?

The Witness: Yes; the Pacific Coast, all of the Kaiser shipyards and Marin Ship up in Marin County, Calship and Consolidated Steel. It did not apply to Los Angeles shipbuilding here. There was a CIO union there, if your Honor please.

Q. (By Mr. Sanders): Directing your attention to paragraph 18 of Plaintiffs' Exhibit 1: "Grievances and Complaints," in your capacity with Calship did you have occasion to confer with Calship officials in regards to grievances and complaints filed under the contract?

A. Yes; I did. I might explain the procedure on that was: The shipyard had an industrial relations manager, and if there were any legal questions that arose in connection [109] with those complaints, why, he always consulted with me, that is, from August, '43 until the completion of the shipbuilding program.

Q. During that period, Mr. Gill, were there any grievances or complaints filed pursuant to para-

(Testimony of Samuel S. Gill.)

graph 18 by the union pertaining to lunch period claims to your knowledge?

Mr. Bertram: Just a moment. At this time, if the court please, I wish to object to this question on the ground that it is hearsay as to the plaintiffs and self-serving with respect to the defendant corporation.

Mr. Sanders: I limited it to his knowledge, your Honor.

The Court: Do you amend your question to ask him if he knows whether any complaints were filed?

Mr. Sanders: That was the way my question was phrased, "to his knowledge".

A. Complaints were filed under this particular—

Mr. Sanders: Just a minute, Mr. Gill. The court has not ruled on the objection.

The Court: Objection overruled; he may answer.

A. I know of no complaints that were filed under that clause which were concerned with the matter of lunch period time until—let's see; I guess until the first action was filed in 1946 that involved that question.

Q. And the same question pertaining to claims for wages for activities performed preceding the shift or immediately [110] at the end of the shift?

A. No; I know of no claims filed under this paragraph and no claims made until 1946, when some cases were filed under this paragraph, with the exception—I want to qualify that. There were some guards who were not subject to this contract,

(Testimony of Samuel S. Gill.)

plant guards, who made a claim in 1945 about their reporting time, when they had to stand roll call; but that was not made under this contract, because those guards were not under the master contract; they were not one of the regular Metal Trades Crafts.

The Court: Was it the course of business that all complaints filed by any employee or by the union under that contract would be referred to you, Mr. Gill?

The Witness: All of those that involved a question of wages would be referred to me. That was the regular course of procedure. There were some complaints, of course, that would be filed under this, involving a particular employee's grievances about their foreman and that sort of thing, I did not get those; but those that involved wages, and particularly this overtime matter, they were referred to me because, at the time I first started doing work for California Shipbuilding Corporation we had had one overtime case filed and there had been shortly before that an investigation made by the Wage and Hour Division; and so they referred all of them—as a result of the interest that was created, they referred [111] all of these matters involving any overtime claims to me. That did not go through their regular grievance channels except to get it, and then they would get in touch with me.

* * *

Q. (By Mr. Sanders): Do you know what kind

(Testimony of Samuel S. Gill.)

of contracts Calship had from October, 1943 up to October, 1945 with the United States Maritime Commission in connection with building ships? I am referring specifically, Mr. Gill, to the method of payment, the financing.

A. The ship contracts—that is what we call the ship contracts—were cost plus a variable fee, I think you might call it.

The Court: The Government paid everything; isn't that a short way to put it?

The Witness: Yes; the Government paid everything and the contractor's fee depended upon the man power hours consumed and the speed with which the ships were built.

The Court: The Government even carried the insurance, did it not?

The Witness: The Government carried all the insurance, [114] even the—well, it did not carry and fix liability insurance.

The Court: Didn't the Government own all the material?

The Witness: The Government owned everything.

The Court: Owned the facilities?

The Witness: Right.

The Court: And paid all bills?

The Witness: The Government owned everything and they had their people in the yard, too.

The Court: That is the Maritime Commission?

The Witness: The Maritime Commission offi-

(Testimony of Samuel S. Gill.)

entials were in the yard. In March of '45 they entered into what was known as a selective price contract, which was a fixed price contract. They would fix a price and, depending upon the price they chose, they would pay a certain maximum profit that would be allowed. If it picked a low price, their maximum profit could be higher. [116]

* * *

Q. (By Mr. Sanders): Also, Mr. Gill, during this period of October, 1943 to and including October, 1945, was California Shipbuilding Corporation engaged in any other way, other than building ships for the U. S. Maritime Commission?

A. No; they were doing nothing except building ships for the United States Maritime Commission. During that period they did a little repair work right at the end, but that was done through the United States Maritime Commission, too, although it was done for the Navy in some cases.

Q. What personnel did the Maritime Commission have in the shipyard during this period, to your knowledge?

A. They had a fellow who was—I can't remember the exact title now. He was sort of like a chief engineer; and then they had an auditor who had quite a large staff. I think [117] he must have had 25 people working under him there.

The Court: He made surveys from time to time to determine progress payments?

The Witness: Yes; he made surveys and checked

(Testimony of Samuel S. Gill.)

accounting and the invoices, and paid the costs as they were incurred by the shipyard.

In addition to that, they had inspectors in the yard who did inspection work. They had one man in the yard who was in charge of industrial relations generally for the Maritime Commission. As bearing on the problem here, the Maritime Commission auditors made spot surveys from time to time to see if the men were working and if they were being paid properly for their work. That was one thing they did from time to time; they made these spot surveys.

Mr. Sanders: No further questions.

Cross-Examination

By Mr. Bertram:

Q. Mr. Gill, from August 20th of 1943, when you, as a member of the firm of Thelen, Marrin, Johnson & Bridges represented California Shipbuilding Corporation, the corporation had on duty at all times at its yard a resident attorney by the name of Russell A. Bergaman, did it not?

A. No. Russell Bergaman was then the industrial relations manager. He was not the resident attorney. They had a resident attorney by the name of Bates Himes at that [118] time when I first started in.

Q. And Mr. Bergaman was at all times which you have mentioned a practicing and licensed attorney, was he not?

A. He was admitted to the State Bar of Cali-

(Testimony of Samuel S. Gill.)

fornia, but he was acting then in a capacity as industrial relations manager.

Q. And it was his duty to take up all grievances that were filed by the union and carry it up to the point where it reached you?

A. I believe that is a correct statement.

Q. In other words, nothing would go to you that had not first gone to Mr. Bergaman, isn't that right?

A. No; that is not exactly necessarily true because the entire procedure—Mr. Warfield, who was the administrative manager at first and later became the general manager, was a very active man, and if some problem arose, for example, with regard to payment of overtime or classification of employees, he might call me direct and Mr. Bergaman might not even know about it. That happened quite often.

Q. Ordinarily Mr. Warfield would know about it only if Mr. Bergaman had advised him that such a problem had come up?

A. No. There were a number of instances where that did not occur, where the Maritime Commission auditor might tell Mr. Warfield of some particular problem.

Q. Then let me put it this way: If the grievance arose through the formal procedure established by the union agreement, [119] that grievance would reach Mr. Bergaman before it would ever reach your office?

(Testimony of Samuel S. Gill.)

A. That would be the normal procedure; yes, sir.

Q. And at Mr. Bergaman's level many grievances were disposed of one way or the other without ever being referred to you?

A. I would say that there were many grievances disposed of, except those that related to overtime problems, particularly, under the Fair Labor Standards Act were referred to me, because at that time I was handling these matters with the Wage and Hour Division and we had already had some litigation filed on that. So Mr. Warfield had all those referred to me that involved overtime or the Wage and Hour Act.

Q. When do you say litigation was filed against the company?

A. Oh, I think the first case was filed by David Sokol in July of 1943, involving some exemption problems.

Q. You knew, did you not, that it was the practice in the yard for Russell Bergaman and certain superintendents and certain representatives of the unions to meet weekly to discuss various problems of employee-employer relationships in the yard?

A. They had meetings. They had a regular management-labor committee that met.

Q. Yes. You did not receive any reports as to the [120] topics that were discussed at those meetings, did you?

A. No; I don't believe I did.

* * *

H. J. LUEDER

one of the plaintiffs herein, called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: H. J. Lueder.

Direct Examination

By Mr. Bertram:

Q. Mr. Lueder, following October 18, 1943 until the time you terminated with California Shipbuilding Corporation what was your capacity?

A. Maintenance electrician.

Q. What were your duties in that job?

A. Well, it was the upkeep or repair of electrical system on the ways.

Q. Did you have a fixed headquarters in your work or were you assigned to a general region within the yard?

A. Well, we had a small building in which we kept our tools and it was called "headquarters," but the work was done over the ways and on the ships.

Q. How many ways, if more than one, did you have within your area to maintain?

A. Just the one at one time. Just one at a time.

Q. And at various times following October 18th you might be shifted around from one way to another, is that right? [127]

A. Yes.

Q. But at any one time you just had one way to take care of?

A. That is all.

(Testimony of H. J. Lueder.)

Q. What shift were you working on during this period of time, Mr. Lueder?

A. That was way 7.

Q. What shift? A. What shift?

Q. Yes. A. Graveyard.

Q. Graveyard shift for all of the period of time following October 18 of 1943? A. Yes.

Q. And were any other employees employed in the same capacity, working alongside of you or in your crew?

A. As a rule, there was one or more.

Q. What were your duties, a little more specifically than you have described them, between you and the company employing you?

A. Well, we took care of the lights, the welding machines and cables, mostly the power and lighting circuits.

Q. Was it within your duties to string the lights into the hold of the ship as the construction of the ship progressed? [128]

A. Yes.

Q. And to remove the lights out of the ship at the time the ship was ready to be launched?

A. Yes.

Q. Change fuses?

A. Changed the fuses, if necessary.

Q. Mr. Lueder, what are you claiming in this action? A. Half hour lunch period.

Q. Do you claim that you were required to or did perform duties for the employer during the lunch period? A. Yes.

(Testimony of H. J. Lueder.)

Q. Will you describe what duties you performed during your lunch period?

A. Well, there was times in which on the ship they were bringing in steel and the holds happened to be dark, and we would have to spend the lunch period putting lights in the holds; or it might be possible that some of the steel had been let down on cables and they had to repair, or the lighting beneath the ways to the various offices might go out and we would have to see if they were fused and find the trouble.

Q. Were those generally the same duties that you performed during the rest of your shift?

A. Oh, yes.

Q. Let me ask you this, first: Did anybody give you any instructions to perform this work during the lunch period? [129]

A. Yes; we had orders in case of trouble to see that it was done.

Q. Do you know why work of that sort was done, particularly stringing lights into the holds, was done during the lunch hour rather than at other times in the shift?

A. Well, if we didn't do it, there would be no lights for the different workmen to see by when working in those particular places.

Q. Were you required to perform some duties during every lunch period which was regularly assigned to the other employees on the graveyard shift?

A. Oh, yes, sure.

(Testimony of H. J. Lueder.)

Q. Were you relieved of your duties for any other time during the shift for the purpose of eating your lunch?

A. No; I can't say that we were.

Q. Did you take a lunch to work with you?

A. Yes.

Q. Did you eat it on the shift?

A. I ate it, yes, during the shift.

Q. Did you have any special time that you started to eat your lunch?

A. Well, we had a lunch period. a half hour lunch period but, as a rule, we didn't have time or, if we did start our lunch, why, we had to lay it down and go out on a case of trouble some place.

Q. Where did you keep your lunch, in this headquarters shack? A. Yes.

Q. Did you have a telephone in that shack?

A. No.

Q. What would interrupt you during your lunch period, if you had started to eat your lunch in the shack?

A. Generally the same trouble that occurred during the rest of the shift.

The Court: More of the same trouble?

The Witness: More of it; yes.

Q. (By Mr. Bertram): The employee who worked alongside of you—by the way, who was it?

A. Well, I had various men. I always breaking in a new man, but the man that worked with me a longer period than any of the rest, his name was Sam Whitney.

(Testimony of H. J. Lueder.)

Q. Did you ever work along with Mr. Garcia, who is a plaintiff in this action? A. No.

Q. Mr. Lueder, do you recall of any occasion in which you were able to take your lunch, the whole lunch, without interruption by some duties?

A. No.

Q. Who was your immediate superior?

A. Well, the foreman was John Leinen. [131]

Q. Did you ever have any discussion with Mr. Leinen, is it? A. Leinen.

Q. L-e-n-n-o-n? A. L-e-i-n-e-n.

Q. L-e-i-n-e-n, Mr. Leinen, with respect to the situation regarding the lunch periods?

A. Oh, yes.

Q. Where was your first such discussion with him?

A. Well, it was, I guess, when we first started to work on the ways.

Q. When was that? A. That was in '42.

Q. What was the discussion you had with him?

A. What we were going to do about this over-time business.

Q. What reply did he make to you?

A. Well, he said, "You know, there is a war on and it will possibly be taken care of later on."

Q. Did you discuss that with him on later occasions when nothing had been done?

A. Well, it was brought up from time to time but there was nothing done about it, no decision made.

(Testimony of H. J. Lueder.)

Q. By the way, you were employed in the capacity of a journeyman, were you not?

A. Yes. [132]

Q. As a journeyman did you have authority, or could you take your problem up to someone in authority over Mr. Leinen?

A. Well, possibly I could, but that was not the procedure.

Q. You had to depend on Mr. Leinen taking it up, was that it?

A. Take it to the foreman, yes.

Q. Who was the superior over Mr. Leinen?

A. The superintendent, a Mr. McFarland.

Q. I see. You never had any discussion with Mr. McFarland concerning this problem?

A. No.

Mr. Bertram: You may cross-examine.

Cross-Examination

By Mr. Sanders:

Q. You were down at Calship quite a few years as an electrician, were you not? A. Yes.

Q. How many, do you recall?

A. About——

Q. Four, wasn't it?

A. I believe it was four.

Q. From 1942 on? A. Yes.

Q. And you were acquainted with the counseling section [133] that they had in the yard there?

A. No.

(Testimony of H. J. Lueder.)

Q. Where you could make complaints? You never heard of that? A. No.

Q. You talked to Mr. Leinen in 1942. Was that the first part of 1942, by the way?

A. I think it was the latter part of '42.

Q. And after that did you ever try to get any relief from your union about this matter?

A. Well, I was a steward there for four years and at one time took it up with the senior steward, and we got the same answer at that particular time: That there was a war on and that it possibly would be taken care of later on.

The Court: By "steward" do you mean a steward of the union?

The Witness: Yes; they are a representative of the union.

Q. (By Mr. Sanders): The steward above you would not give you any satisfaction, is that right?

A. That is it.

Q. Well, then, your union had meetings from time to time, didn't it?

A. Sure, every month.

Q. And every member had the right to come up and state his case, didn't he? [134]

A. Well, that is what some people think.

Q. I am asking if that is a fact in your union. I do not know, and presume you do. Couldn't you attend your own union meetings?

A. Oh, yes.

Q. And get up and make a complaint about your working conditions, if you wanted to?

(Testimony of H. J. Lueder.)

A. Well, at that particular time if anything was said about a half hour overtime, you were told that there was a war on and you would be taken care of possibly later on.

Q. Did you get up and mention this?

A. No.

Q. At a meeting? A. No.

Q. So that is only your surmise, that you would have been told that if you had gotten up, is that right?

A. Well, I have been a member for pretty close to 40 years. I know generally what the procedure is.

Q. Well, I am asking you. That is just your conclusion of what would have happened if you had gotten up, since you did not so object, is that right?

A. I would have been probably told to sit down.

Q. As the union steward, you were aware of the fact that the lunch period was not compensated for, weren't you? A. Oh, yes. [135]

Q. And you were aware, I presume, of the grievance procedure if you had any grievance as to working conditions, that they had to be filed within a certain time or they would be deemed waived under your bargaining agreement, isn't that right?

A. No; I knew nothing about that.

Q. You did not know about that?

A. No.

Q. You said one other man worked with you in this shack or out of this shack most of the time?

A. Yes.

(Testimony of H. J. Lueder.)

Q. Sometimes maybe more than one man?

A. What?

Q. Sometimes perhaps more than one other man?

A. Oh, yes.

The Court: What type of work did you do other than during the lunch period?

The Witness: Well, practically all our work was trouble, fuses out of various circuits, welding machines, blowing fuses or hooking up welding machines, connecting up lights, making up stringers.

Q. (By Mr. Sanders): Stringing lights, replacing fuses, repairing cables. What else, if anything?

The Court: He has testified that he just did more of the same that he did all the rest of the day, only he did [136] it during the noon hour. The electrical system did not know it was lunch time and it had the same problems, I assume, during the lunch hour as it had the rest of the day, is that it?

The Witness: That is it.

Q. (By Mr. Sanders): How many fuses on an average would you have a replace in a day yourself?

A. Well, a lot depended on the weather conditions; generally 25 to 50.

Q. Where would you eat your lunch, in the shack?

A. Generally attempted to eat our lunch in the shack; yes.

Q. Any place else?

A. No; not unless we had a call and I had started to eat lunch and I took it along with me in most cases.

(Testimony of H. J. Lueder.)

The Court: Did you ever sit down to eat lunch and get a call that a fuse had blown?

The Witness: Oh, plenty of them.

Q. (By Mr. Sanders): What would be your best estimate of the longest period that you had during the lunch period where you had no calls, five minutes?

A. Well, that is a pretty hard question to answer.

Q. Well, practically, you were busy all the time?

A. Busy all the time.

Q. Just a few minutes break here and there?

A. That is it.

The Court: Didn't you ever have a perfect day?

The Witness: No.

The Court: Where you did not have any calls?

The Witness: No.

The Court: There never was a day when you were not interrupted during your lunch hour, is that it?

The Witness: Oh, no.

Q. (By Mr. Sanders): During the lunch period, if a fuse had burned out some place, I take it that means taking the fuse, unscrewing it, and putting another in, is that right?

A. It depends on the type of fuse.

Q. Who would go out on that, one man or both of you?

A. I always took a man with me because I had so many new men with me. I was always breaking in a new man.

(Testimony of H. J. Lueder.)

Q. Was Sam Whitney a new man?

A. No. He was only with me a short time.

Q. He was an old-timer, wasn't he?

A. Yes; he was an old-timer.

Q. This condition of these activities during your lunch period were prevalent throughout your employment at Calship from the very beginning?

A. Oh, yes, yes.

Q. How long would it take you to string lights in a hold? [138]

A. Well, a lot depended on if I had anyone to help me or not. On some occasions I had no one helping me and it would take—or, possibly a couple of hours or more.

Q. Normally you would take the other man with you, I thought, when you went out on the job?

A. Oh, yes, yes.

Q. Is it your testimony now that part of the time you were the only man on the job?

A. Well, every now and then, why, we would have a couple of jobs, two or three jobs would come in at the same time. One man would be stringing lights and the other man would go out and chase down the trouble.

Q. Did the other man eat lunch with you?

A. He carried lunch; yes, sir.

Q. Did he eat lunch with you?

A. I never paid any attention to him.

Q. You never observed him eating lunch?

A. No.

(Testimony of H. J. Lueder.)

The Court: What happened during the lunch hour, is that a fair sample of what happened all during the shift?

A. We were generally busy most of the time.

The Court: Did you ever have any 15 or 20-minute hulls?

The Witness: Oh, yes.

The Court: 30-minute hulls?

The Witness: Yes. [139]

The Court: Hour hulls?

The Witness: Well, very seldom did you ever get that long a time when there was nothing to do.

The Court: Can't you remember a few such possible periods?

The Witness: No. We always had plenty of work to do in the shack. We had plenty of lamp cords and various cables to repair.

Q. (By Mr. Sanders): Did Leinen or any other foreman tell you that where you had a lull period as far as trouble on the ways, that you had to repair things in the shack?

A. Oh, yes, sure.

Q. What about the lunch period; did he tell you not to take time off for lunch?

A. Well, that was inferred. If we had that work to do, it was thoroughly understood, if it was not done, why, they would get somebody else to do it.

Q. You mean you inferred?

A. It was inferred.

Q. That you had better do it during your lunch period or they would get somebody else to do it?

(Testimony of H. J. Lueder.)

A. That is it.

Q. From what he told you; he didn't actually tell you that, did he?

A. Well, that didn't need to be told you.

Q. What did he tell you? [140]

A. He told us to stay on the way, don't wander off, and if that trouble showed up, get it and fix it up.

Q. Did you ask him about the lunch period, about time off to eat lunch?

A. That was asked him long before we ever started.

Q. You say you asked him long before?

A. Sure.

Q. When was that?

A. What we were going to do about the lunch period.

Q. What did he tell you at that time?

A. "Don't you know we have got a war on? That will be taken care of later on."

Q. At that time, in 1942, did you report that to the union? A. No.

The Court: Did you actually eat lunch over-time?

The Witness: Sometimes.

The Court: You worked it in somewhere, is that it?

The Witness: I only took one sandwich. I didn't take much.

The Court: You were on the graveyard shift?

(Testimony of H. J. Lueder.)

The Witness: Graveyard shift.

Q. (By Mr. Sanders): If you wanted to, you could eat before the regular graveyard lunch period?

A. Well, we had orders not to, but I presume it was done. [141]

Q. You did not, though? A. No.

Q. Did you after the lunch period?

A. Did I what?

Q. Did you sometimes eat after the lunch period?

A. Well, I can't remember whether I did or not.

The Court: Every day you ate either before or during or after the lunch period, did you not?

The Witness: That is it.

Q. (By Mr. Sanders): Didn't Leinen tell you that you were supposed to take your lunch period off and eat at that time? A. No.

Q. He told you you were supposed to work during that time?

A. That is, if the work was there to be done, get out and do it.

Q. He did not tell you you could not take your lunch later, then, did he?

A. Oh, no; nothing said about that.

Q. I assume that you could take your lunch later?

A. Well, there were several orders put out that no one was supposed to eat their lunch before that lunch period. That was very well understood for years there.

(Testimony of H. J. Lueder.)

Q. But if you had emergency work during your lunch [142] period it was understood you could eat later on, is that right?

A. I don't know whether it was understood or not. They did it.

Q. Did you do it?

A. Well, I don't remember whether I did or not.

Q. But you do remember you had your lunch every day?

A. I got away with it some way.

Q. And you do remember that you were always busy during the regular graveyard lunch period?

A. Oh, absolutely.

Mr. Sanders: No further questions.

Mr. Bertram: Call Mr. Garcia.

The Court: You may step down, Mr. Lueder.

JOHN S. GARCIA

one of the plaintiffs herein, called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: John S. Garcia.

Direct Examination

By Mr. Bertram:

Q. Mr. Garcia, what was your job at California Shipbuilding Corporation after October 18, 1943?

A. My job, I worked for a time as marine wire-

(Testimony of John S. Garcia.)

man for about two or three months, something like that, and then I was transferred over to maintenance electrician. [143]

Q. As I understand it, your claim now relates only to the time that you were employed as a maintenance electrician? A. That is right.

Q. Do you now have any independent recollection of what the dates of that period were?

Or, may we stipulate to it, counsel?

A. No; I don't.

Mr. Sanders: In July, 1944, until his termination in May or April of 1945, he was a maintenance electrician.

Mr. Bertram: All right.

Q. Confining your testimony, then, Mr. Garcia, to that period what were your duties as a maintenance electrician?

A. As a maintenance electrician my duties were to keep the way and the boat lit up at all times, and to see to it that all the holds, all the hatches and every possible place where people would get hurt to be constantly lit up.

Q. Were you assigned to a particular way in the shipyard?

A. I was assigned to No. 2 way for a time and then I was shifted around from 1 to 7 different ways.

Q. At any one time your duties were performed in No. 1 of the ways? A. That is right.

Q. Only one of the ways?

A. That is right.

(Testimony of John S. Garcia.)

Q. Was each of the ways on which you worked equipped [144] with an electrician's headquarters?

A. We had what we called a shack, and prior to laying down of the keel our shack was always on what I would call the starboard side, either side of the way, and as the ship progressed, why, they moved up the shack to—well, when the ship was about halfway done they would move it up to the top deck and our shack would remain there until the launching time.

Q. Now, what is your claim in this action, Mr. Garcia?

A. My claim is 30 minutes lunch period.

The Court: What shift did you work?

The Witness: Swing shift.

The Court: Always the swing shift?

The Witness: For a while on swing shift and then I would change over to day.

The Court: Day or swing?

The Witness: Day or swing.

Q. (By Mr. Bertram): Is it your claim that you worked during your lunch period, both while you were employed on the swing shift and while you were employed on the day shift?

A. It is.

Q. How many maintenance electricians worked in your crew on your particular way at any one time? A. Two.

Q. Yourself and one other?

A. Myself and another. [145]

(Testimony of John S. Garcia.)

Q. What duties did you perform during your lunch period?

A. During my lunch period there would always be somebody that would come to the shack with either trouble on the way, trouble in one of the holds, the lights, whole strings would go out at one time and there would not be no way for the workmen of the different crafts to get out of that hold unless they had lights. And they had ladders to go up, but if one put their foot through one of those ladders and fall off, they would break their leg or bruise their arm or something. And I remember distinctly what they called the safety engineer got after us a number of times to keep the boat lit up as well as we could, especially the hatches and the gangways coming down from the top deck.

Q. And were those duties performed by you during your lunch period also the duties that you performed during the rest of your shift?

A. That is right; that is right.

Q. Did you carry a lunch to work with you?

A. I did.

Q. Did you get a chance to eat your lunch some time during the shift?

A. I would grab a sandwich between trouble calls and I ate it, but I ate it sometimes outside the shack, sometimes down in one of the holds. I would take an apple in my pocket.

Q. How big a lunch did you carry with you?

A. Two sandwiches and an apple, sometimes, a banana or something.

(Testimony of John S. Garcia.)

Q. Do you remember any occasion on which you were able to complete your lunch without interruption? A. No; I don't.

Q. And by interruption I mean interruption by some duty to be performed?

A. No; I don't.

Q. Did you customarily attempt to start your lunch at the same time each night or each day?

A. You couldn't. You couldn't regulate the time that you were going to eat your lunch or whatever you happened to carry with you.

Q. If you missed your lunch period because of duties to be performed during that part of the day, were you relieved of your duties during some other part of the shift for the purpose of eating your lunch?

A. I was never relieved of my duties.

Mr. Bertram: You may cross-examine.

Cross-Examination

By Mr. Sanders:

Q. How many fuses would you change during the shift on an average, about 25 to 50?

A. Sometimes even more than that.

Q. That would be a good average, wouldn't it, 25 to 50? [147]

A. That would be a good average; yes, sir.

Q. The lights were going out very often on these ships, weren't they?

A. That is right; yes, sir. Sometimes whole strings of them, we used to change them. We used to use as many as two cartons of bulbs a night.

(Testimony of John S. Garcia.)

Q. Electric light bulbs?

A. Electric light bulbs; and that can be checked by Mr. Paul Shurk who was our foreman.

Q. You mean they were burning out?

A. They would burn out and the whole string would go out, and it was our duty to go and see where the trouble was and put all those lights that would burn out back into service again.

Q. I assume that when you went out on these jobs you and the other man would always go out there together, is that right? A. Yes.

Q. Like to change a fuse, the two of you would go out to change it? A. Yes; we would.

Q. Or to put in light bulbs, both of you would go out? A. That is right.

Q. You had no lull periods at all during the shift; you were just busy all the time, is that right?

A. We had lull periods, I would say, oh, five to ten [148] minutes, but we were continually walking through the holds. That was our instructions, our explicit instructions from Mr. Shurk: "Walk through the holds and find your trouble. If they are supposed to light up, get them lit up. If there is trouble under a way, go check it and get it fixed up."

Q. The two of you would walk together around the ship?

A. Sometimes; not all the time. One would start one side of the boat and the other would go the other side.

(Testimony of John S. Garcia.)

Q. Then if a foreman some place on the way, for example, found some trouble he would walk around the ship until he found you and would give you the report of the trouble, is that right?

A. The foreman would get his orders. He had an office under way 7 and the report would come in there, and then he would relay it to us to our shack. We had notes delivered to us in a little box, and he put the trouble notes in there.

Q. What instructions were you given as to when you would eat your lunch?

A. There was never any instructions given as to that.

Q. When did you eat your lunch, before or after or during the regular shipyard lunch period?

A. We ate our lunch whenever we could in between trouble shooting.

Q. Well, when would you normally? Didn't you have a regular time when you generally ate it every day?

A. No. No; we didn't have any regular time. I knew there [149] was a time to eat lunch, like when I was employed as a painter, and I thought it was very strange that the maintenance electricians didn't have their time off to eat their lunch.

Q. Didn't you take time off for lunch?

A. No; I didn't.

Q. Did somebody tell you you could not take time off for lunch, Mr. Garcia?

A. Nobody told me I couldn't take time.

(Testimony of John S. Garcia.)

Q. What? A. Nobody told me.

Q. You knew that lunch periods you were not being paid for, didn't you?

A. That is right.

Q. And nobody told you that you were to work during the lunch period, during the time you were eating your lunch, did they?

A. They told us to stand by for trouble.

Q. Didn't you ask anybody: What about my lunch? When do I eat lunch?

A. I did. I told Mr. Bland, who was my lead man; I asked him, I said, "Don't these fellows ever eat lunch on these ways?" And he says, "Well, if there is trouble, go out and get it, go out and check it and fix it."

Q. Mr. Bland, was that the man you worked with?

A. Mr. Bland was our lead man; Mr. Shurk was our foreman. [150]

Q. Mr. Bland was on the way with you, wasn't he?

A. Mr. Bland was not on the way with me. I was checking from one to seven.

Q. He said when there was trouble to go out and fix it?

A. That is right; and there was trouble all the time.

Q. And did he also say in that conversation, Mr. Garcia, "Never take any time off to eat your lunch"? A. He didn't say that.

(Testimony of John S. Garcia.)

Q. How long would you say you would spend to eat your lunch normally, about five minutes, maybe?

A. About five, four minutes, three minutes, whenever I could grab a bite.

Q. I mean the total time you would take to eat your lunch.

A. Oh, well, the normal time I would take to eat a sandwich, five minutes, four minutes.

Q. That is the time you would take to eat?

A. That is right.

Q. How many sandwiches did you say you took?

A. Two sandwiches.

Q. How many apples?

A. One apple and sometimes a banana.

Q. Did you eat with the other man that worked with you?

A. No; I didn't. I didn't notice him.

Q. Where did he eat? [151]

A. I don't know where he ate.

Q. I thought you traveled together, Mr. Garcia?

A. Sometimes, sometimes we traveled together. Sometimes, like I say, we would go together and he would go to one side of the boat and I would take the other side of the boat.

Q. So he would probably be eating when he would be walking around there or some place?

A. Possibly.

Q. Did you used to eat when you were walking around sometimes?

A. Sometimes.

(Testimony of John S. Garcia.)

Q. And when you were working you would have a sandwich in one hand and a string of lights in the other?

A. Not necessarily; but I would eat at some time.

Mr. Sanders: No further questions, your Honor.

* * *

JOHN ZUPONCIC

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: John Zuponcic.

The Clerk: Spell your last name, please.

The Witness: Z-u-p-o-n-c-i-c.

Direct Examination

By Mr. Sanders:

Q. In October, 1943, Mr. Zuponcic, you were employed by California Shipbuilding Corporation in what capacity? A. Chief electrician.

Q. And did you continue in that capacity?

A. I continued in that capacity until sometime in 1945—I don't recall the date—where I took charge of all electrical and also mechanical maintenance, in charge of the trucking and [160] in the yard, etc.

Mr. Bertram: Counsel, if your records show the date, we will stipulate.

Mr. Sanders: I do not have it.

Q. Do you recall what date that the acetylene,

(Testimony of John Zuponcic.)

oxygen, and compressor plants in the shipyard came under your supervision?

A. It was early in 1945, I believe.

Q. Prior to that time they were not under your supervision, is that correct? A. That is right.

Q. As chief electrician from October, 1943 up to October, 1945 you had the maintenance electricians under you, did you not?

A. That is right.

Q. What provisions, if any, did you make as to lunch period for these maintenance electricians? I am speaking of the ones that worked on the ways that you have heard the testimony about here today.

A. Well, we had a problem there where it was necessary for us to maintain 24 hours' production, and the only way we could do it was that if a trouble occurred during noon hour, it was necessary for someone to fix it; and that was understood by all the foremen, lead men, and so forth. With this provision: That whenever they did take and do any work during [161] a noon hour, they were supposed to take a lunch hour or take their lunch either previous or after. And I was called on the carpet time and time again on that very fact about the men eating lunch before the noontime. And I said, "Well, now, those fellows are maintenance electricians and they are going to have a job to do that is going to be necessary to be done at 12:00 o'clock noon," or as the case may be, during the noon hour.

Q. Were any orders ever issued in your depart-

(Testimony of John Zuponcic.)

ment, to your knowledge, that the men were to take less than 30 minutes to eat their lunch?

A. Absolutely not.

Q. Did you ever receive any complaints from any of these maintenance electricians that he did not have adequate time or did not have his lunch period to eat his lunch in?

Mr. Bertram: Just a moment. I will object unless it referred to plaintiffs. They are the ones who would be bound by a complaint or failure to make complaint.

The Court: Do you amend your question?

Mr. Sanders: Pardon, your Honor?

The Court: Do you amend your question?

Mr. Sanders: Yes.

Q. Did you ever receive any complaint by either plaintiff Garcia or by plaintiff Lueder?

A. Oh, no; that never was brought to my attention. [162]

Q. These maintenance electricians had to string lights in the ships, is that right?

A. To some extent, yes. Most of the stringing of the lights on the ship ways were done by a separate crew that went through and did nothing else but string lights. However, there was times on various shifts, swing shifts and graveyard, where it was necessary for the men up on the ship way to string the lights, due to the fact that a section came in at that particular time and it was necessary for them to get it lit up.

(Testimony of John Zuponcic.)

Q. As an electrician, Mr. Zuponcic, if 50 fuses were burning out on the swing shift of one maintenance electrician who covered one way, would that indicate that the lights were going out for a considerable portion of the time?

A. Well, that would indicate to me that the next day I would probably have been fired.

Q. What do you mean by fired?

A. Well, the next day—every day we had a lunch, wherein the various superintendents and foremen brought their grievances, and if the lights or welding machines or any other electrical equipment was out for any great length of time, I would have heard about it.

Q. As to the compressor, oxygen, and acetylene plants, you say you took over supervision of those in 1945 sometime?

A. That is right.

Q. What supervision did you have? [163]

A. In what way?

Q. What was your capacity in regard to these three plants?

A. Well, my title was "superintendent of mechanical maintenance," which included electrical maintenance and electrical construction. I had charge of the electrical maintenance; I had charge of electrical facility installations throughout the shipyard; I had charge of all the rolling stock, which was all of the trucks, tractors, cranes, etc.; I had charge of the machine shop and charge of the compressor plant and the oxygen plant and the acetylene plant. However, there were men under-

(Testimony of John Zuponcic.)

neath me that were given direct charge over these various units.

Q. Under your supervision?

A. That is right. In other words, Mr. Alcott was in charge of mechanical maintenance; Mr. Buster was in charge of the garage; Norman Duers was in charge of the electrical maintenance; and Bob Monson was in charge of the construction. In other words, it was all delegated to various foremen or superintendents.

Q. Was Mr. Alcott, who was under you, the man in charge of the compressor, oxygen, and acetylene plants?

A. Yes; he was in charge of the mechanical maintenance, representing all the mechanical repair in the yard. He was in charge of the operation of the acetylene plant and the [164] operation of the oxygen plant.

Q. Did you ever give him any orders, Mr. Zuponcic, that the men were not to be given their full lunch period time in those plants?

A. No; never gave any of those orders.

Q. Were you ever informed that the plaintiffs or any other operators in those plants were not getting their lunch period?

A. Well, I knew that the men had to work through their lunch hour but, to my knowledge, they were all able to eat lunch at any time that they saw fit.

Q. You never received any complaints that any

(Testimony of John Zuponcic.)

operators were not getting their lunch hours in the oxygen, compressor, or acetylene plants, did you?

A. No; I didn't.

Q. In connection with your activities at Calship did you have occasion to attend what is known as the "blue plate luncheons"?

A. Yes. That was a daily luncheon.

Q. What was the blue plate luncheon?

A. Well, it was really what they called the blue room. It was a room that was adjoining the cafeteria wherein all the superintendents and other interested parties, or mainly superintendents and general foremen and foremen and the manager of the yard and the head of the Maritime Commission came for dinner every day. And after the dinner — [165]

The Court: By "dinner" you mean at the noon time?

The Witness: At noon time, yes. After the noon dinner, why, there was always a speaker and we discussed some problems pertaining to the yard, either labor or production or what was going to develop in the future, and problems that the various individual superintendents had; and if any superintendent, for example, had a problem in production or some phase of the job was holding his particular job up, he would bring that up and ask if there isn't some way that the trouble that was holding back production could not be sifted out and brought out so that he could go ahead with his end of the job.

(Testimony of John Zuponcic.)

Q. By Mr. Sanders: Were the representatives of labor unions in attendance at those luncheons?

A. No; just on certain occasions when they happened to be in the yard. They were not a regular visitor there at all.

Q. At any of these luncheons did you receive complaints from any of the superintendents that the lights were going out so much on the ways that the men could not work?

A. Well, at times we would get a complaint—oh, for various reasons. There would be a bad power failure, and I would have the answer for him, tell him just exactly what happened and how long they were down.

The Court: We are talking about fuses blowing out. Did you ever have any complaints about fuses blowing out?

The Witness: I have had complaints, yes, of fuses, but I [166] would say they were very rare. They were not an occasion whereby there would be thousands of fuses blown in a night.

The Court: Or even 25 or 50?

The Witness: Well, let me say this: We had 14 ship ways——

The Court: Don't tell us all about that. Just give us an estimate of how many fuses on a shift on an average would blow out, say, on the graveyard shift. How many fuses would you use?

The Witness: Oh, I would say for the whole shipyard, possibly a couple of hundred.

(Testimony of John Zuponcic.)

The Court: You mean to be replaced every night?

The Witness: The whole shipyard.

The Court: Any further questions?

Mr. Sanders: No, your Honor.

The Court: Cross-examination?

Mr. Bertram: Just one or two questions, your Honor.

Cross-Examination

By Mr. Bertram:

Q. Mr. Zuponcic, you spent most of your time at the yard on the day shift, didn't you?

A. I was there on all shifts. I spent possibly 16 hours a day there.

Q. You would not and did not give any orders directly to a journeyman?

A. No, sir. It was definitely against the union rules, [167] where I could only talk to my immediate subordinates.

Q. That would be through a superintendent?

A. That is right.

Q. Who in turn would carry their own orders through the foremen, down to the lead men and then the journeymen, is that right?

A. That is right.

Q. You knew, of course, as you testified, that the men in the jobs that these plaintiffs were in worked during the regular yard lunch period?

A. Yes; night and overtime, you know, whenever it was necessary.

(Testimony of John Zuponcic.)

Q. Whenever things were to be done?

A. That is right.

Q. And I think you testified that it was your order that when that happened they should be given another luncheon period? A. That is right.

Q. Isn't it a fact, Mr. Zuponcic, that if another lunch period were provided, they would still be under the same orders to take care of any repair or maintenance that might come up?

A. It is possible.

Q. That is the fact?

A. It is possible; yes.

Mr. Bertram: I think that is all, your Honor.

The Court: Anything further? [168]

Mr. Sanders: I have one matter I neglected to go into on direct, your Honor. I would like to go into it.

The Court: You may.

Redirect Examination

By Mr. Sanders:

Q. Are you familiar with the procedure for overtime worked by hourly wage employees on Cal-ship other than regular shift time?

A. For overtime? Well, we had a regular procedure. I could not authorize any overtime myself. The electrical maintenance department worked on a little different contract, as I understand it, from the rest of the yard, wherein we were under the Maritime Commission. Mr. Jagel, he had charge of the facilities. We had to get an approval from

(Testimony of John Zuponcic.)

the Maritime Commission direct for all overtime worked by our department.

Q. In other words, would a foreman or lead man have the authority to order journeymen to work other than the regular shift hours?

A. Only if he got the authority from me, that is, came up through me and I would request it from my superior, and he would in turn request it from the Maritime Commission.

Q. That was the procedure throughout the war years with Calship, was it not?

A. That is right.

Mr. Sanders: That is all. [169]

* * *

MELVILLE ALCOTT

called as a witness by plaintiffs in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Melville Alcott.

Direct Examination

By Mr. Bertram:

Q. Mr. Alcott, from October of 1943 you were employed by California Shipbuilding Corporation in what capacity?

A. Supervisor, assistant chief inspector was the title given me.

Q. In that capacity what jurisdiction did you have and over what phase of the yard?

A. I had charge of all utilities, consisting of the

(Testimony of Melville Alcott.)

acetylene plant, compressor plant, steam plant and, towards the [171] end of that time, the mechanical maintenance.

Q. Until what time did you continue in that capacity, Mr. Alcott? A. Sir?

Q. Until what time did you continue to work on that job? A. In 1945.

Q. What part of 1945?

A. Well, until I was laid off. I think it was in August.

Q. For a portion of that time was Mr. Zuponcic in authority over you? A. He was.

Q. For what period of time?

A. Well, approximately as I remember it, three months. I couldn't give you the dates on that, but I think that was about right.

Q. Was that the last three months of your employment there?

A. No; it was toward the end of the building of the ships. Now, I could not give you the dates on that at all.

Q. During that three-month period did you receive any orders of any kind from Mr. Zuponcic with respect to the operation of the acetylene plant, the compressor plant, or the oxygen plant?

A. No; I did not receive any direct orders from Mr. Zuponcic regarding them, except consultation on things [172] that pertained to the different plants.

Q. During the entire period of your employment

(Testimony of Melville Alcott.)

with Calship while you were in charge of those three plants was any provision made for the employees operating those plants to take their lunch period?

A. Not to my knowledge.

Q. Did they take a designated lunch period?

A. They did not.

Q. Were any orders issued to them that they could not take a half hour lunch period?

A. I can't say that there were any orders issued to that effect; but it was generally understood that they worked from 8:00 until 4:30, that is, the regular shifts, and a man could not leave any of the different utilities except for a very short period of time.

Q. What do you mean "for a very short period of time"?

A. Well, at the steam plant it was allowable to leave for 10 minutes for toilet facilities, and the toilet facilities in the compressor plant were in the plant, and the man was not supposed to leave the plant at any time. The acetylene plant was very close to the compressor plant, and the acetylene operators could use the facilities in the compressor plant.

Q. At any time, Mr. Alcott, was any attempt made to give the men a half hour lunch period?

A. I believe that Mr. Kell made that attempt but nothing [173] ever came of it.

Q. Was any effort made to obtain payment for the extra half hour that the men were working?

(Testimony of Melville Alcott.)

A. Well, there were rumors to that effect, but I can't say that anything came of that, either.

Q. Mr. Kell was in authority over you for the entire period of time except while Mr. Zuponcic exercised authority for three months, is that right?

A. Mr. Kell was.

Q. And what was Mr. Kell's capacity?

A. Mr. Kell's capacity was superintendent of maintenance.

Mr. Bertram: You may cross-examine.

Cross-Examination

By Mr. Sanders:

Q. You knew Foreman Yates, Mr. Alcott?

A. That is right.

Q. He was on the day shift, wasn't he?

A. He was.

Q. Where was your office in distance to the acetylene plant, how far away?

A. Well, it was probably a thousand feet, I should say.

Q. Did Mr. Yates bring over reports to you daily? A. He did.

Q. The acetylene plant had a crew of how many?

A. At different times it varied. The acetylene plant was enlarged and there were two and sometimes three men on duty [174] at the acetylene plant at all times.

Q. How many on the day shift, do you recall, in 1944?

A. Toward the last, when we were running it very heavy, it was three men.

(Testimony of Melville Alcott.)

Q. In the latter part of the shipyard operation down there was there any change made as to the gauges in the acetylene plant? A. Yes.

Q. What was the change?

A. Complete new equipment was put in the acetylene plant and the—well, I couldn't give you the identical details on that.

Q. Well, weren't the gauges all consolidated?

A. They were.

Q. So one man could see all the gauges?

A. That is right.

Q. You stated that the orders were that the men were to stay on the job throughout their shift. Isn't it true that your requirement was that, for example, in the acetylene plant, that you wanted a man in there at all times?

A. No; I can't say that that is correct.

Q. What was correct, Mr. Alcott?

A. The acetylene plant was divided into three parts; that is, half of the machines were in one part and half in another, and the loading compartment was in another department, [175] that is, another part of the building between the two plants; and it was necessary for the men to stay in their one part of the building, that is, not necessarily to be there for—maybe they could be out of there for four or five minutes at a time, but acetylene generators are very tricky and you have got to go around and feel of them and see that they are not too hot, and take particularly good care of them.

(Testimony of Melville Alcott.)

Q. Did you observe the crew eating their lunch in the acetylene plant? A. Yes.

Q. Where would they eat their lunch?

A. Right in front of the doors of the plant.

Q. You mean outside or inside?

A. Well, they would eat outside and then during the lunch period—I won't say "lunch period"—but during the time that they were eating they would probably make several trips into the plant and observe conditions.

Q. Did they all eat at the same time at the times that you saw them?

A. I don't remember as they did.

Q. They might have; you do not recall?

A. I don't recall.

Q. How long have you been in this business of this type of utility, acetylene, compressor, and oxygen work?

A. Acetylene and oxygen work was new to me when I went [176] to Calship.

Q. What type of work had you done?

A. Steam engineer for 35 years.

Q. What kind? A. Steam engineer.

Q. For 35 years? A. Yes, sir.

Q. And during that time has it always been your experience that you would eat lunch in the area where you would work? A. Always.

Mr. Sanders: No further questions.

ALVIN M. MOWREY

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Alvin M. Mowrey.

Direct Examination

By Mr. Sanders:

Q. You were employed at California Shipbuilding Corporation, Mr. Mowrey, during the war?

A. Yes. [177]

Q. What years?

A. I believe it was January, '42 until March of '46.

Q. And in October, 1943 what was your position?

A. In October of 1943 I was assistant superintendent directly under Mr. Kell. That was my title.

Q. Of what department?

A. The maintenance.

Q. Under you did you have plaintiff Hector in this case? A. Yes.

Q. Are you familiar with the duties and work performed in his capacity? A. Yes, sir; I am.

Q. Mr. Mowrey, did you ever give Mr. Hector instructions he was not to take his lunch period?

A. No.

Q. At any time during the shift?

A. I never did.

Q. Did you ever give any instructions relative to performing work during the regular shipyard lunch period?

(Testimony of Alvin M. Mowrey.)

A. Yes; I have done that on various occasions that an emergency would come up or something like that, why, orders were issued that the men were to go ahead and do the work, and then take their lunch period after the job was done; or if they knew the job was coming up and had to be done, why, it was optional whether they would take their lunch before they went out to do [178] the job or whether they would take it after they finished. I didn't make any strict rules as to when they were to eat their lunch.

Q. I believe Mr. Hector was on the graveyard shift?

A. That is right.

Q. Were you on the graveyard shift?

A. Well, I used to come in on my graveyard shift, averaged about once or twice a week, to check to see that things were going on.

Q. You were responsible for all three shifts?

A. That is right.

Q. To your knowledge how often would these emergency repairs come up?

A. Oh, I would say possibly we would have an emergency repair whereby a man was required to work his lunch hour possibly once every ten days or two weeks, something like that. But we had in one setup there in the plate shop that came up about every 90 days, we had to change the main lead lines on the acetylene and oxygen hose coming into the planograph and various machines like that, and that was so arranged that we could do that while

(Testimony of Alvin M. Mowrey.)

the main production of the yard was down, which was on their lunch hours. And we would change maybe one machine or two machines in this lunch hour, and the following lunch hour get the next two. In other words, it was so rotated that we would go right straight through these and it [179] would take us about a week to make that complete change, and then that was done for about 30 days. But all those times when that was done, why, the men would either have their lunch before they went out to do this job or they would go ahead and do the job during the regular lunch period of the yard, and then come in and eat their lunch after they had finished. And it was optional with them. I didn't give any definite orders as to when they was to eat their lunch one way or the other. [180]

* * *

Q. Did you have occasion to require a man to work other than his regular shift time?

A. No.

Q. Do you know if there were union stewards in the shipyards at all times? [181]

A. That is right.

Q. What was their function, if you know?

A. I beg pardon?

Q. What was their function, if you know?

A. I didn't catch that.

Q. What was their purpose in the yard, if you know?

A. Oh, that was to see that the men had decent

(Testimony of Alvin M. Mowrey.)

working conditions, and if a man had any grievance or something, he took it up with his steward and his steward brought it to the attention of the head of the department; and then if he didn't do anything about it, why, then it was taken directly to the union itself and the union officials would come in and meet with the department heads and they would work out and settle their grievance one way or the other.

Q. Did you ever receive any complaint from the plaintiff Hector in this case as to not being paid for his lunch period? A. No; I never did.

Q. As to having to work during his lunch period? A. No; I never did.

Q. As to having to come in before the shift began? A. No.

Q. As to having to remain after the shift ended?

A. No.

Q. As to any employees in similar capacities under you? A. No; I never did. [182]

Q. At any time during your employment down there? A. No.

Mr. Sanders: You may cross-examine.

Cross-Examination

By Mr. Bertram:

Q. Mr. Mowrey, did you personally know Mr. Hector when he worked at the shipyard?

A. Yes, sir.

Q. And he was a foreman?

A. That is right.

(Testimony of Alvin M. Mowrey.)

Q. You were immediately over him in your position?
A. That is right.

Q. Was there a supervisor over him on the graveyard shift?

A. No; other than myself. There was a fellow, Dock Reynolds——

Q. Only what?

A. There was a man that was in the main office, whose name was Reynolds, “Dock” Reynolds—I don’t know what his initials were—and he was on the graveyard shift there. Well, he used to take the blunt of this situation. In other words, if an emergency came up and they had to have something right now, then their instructions was to go to Dock Reynolds. In other words, I had told Dock Reynolds to act in my capacity in that particular case, you know. [183]

Q. I see.

A. Where, for instance, if I happened to be out to a show or was late getting in or something, or something like that, they couldn’t contact me at home, why, he was to act in the capacity that I was in.

Q. All right. Now, Mr. Mowrey, you have stated that once or twice a week you would get down to the yard during the graveyard shift.

A. That is right.

Q. On those occasions did you work the entire graveyard shift?
A. No. No; I would not.

Q. You came in for the latter portion of the

(Testimony of Alvin M. Mowrey.)

graveyard shift and stayed there until your regular day shift, did you?

A. Well, sometimes I came in early on the graveyard shift and stayed right through to the day, and other times, if I happened to be in on the swing shift, why, I would lap over onto the graveyard shift, maybe, for an hour or two hours, something like that, to see that everything was going all right, you know.

Q. The longest you generally remained on the graveyard shift was an hour or two immediately after it started, lapping over from the swing shift, or an hour or two before it ended?

A. That is right.

Q. To lap over into the day shift, is that right?

A. That is right.

Q. Did I understand your testimony to be this: That about once every 90 days there was a change over of the acetylene and oxygen lead lines?

A. That is right.

Q. Which took about a week?

A. In the plate shop it took us about a week to make that change. We could not get all the machines, you know, from one lunch period. We would sometimes be able to get two of them on this lunch period, and then on the following day we would get the next two, and so on down the line that way. We had to rotate it so we would not shut the entire plant down, you see.

Q. Did all three shifts work on that change over for a week?

(Testimony of Alvin M. Mowrey.)

A. No. We worked that on graveyard and on swing shift mostly. The biggest part of it was done on the graveyard shift, and due to the fact that the graveyard shift had the lowest personnel on production, you see.

Q. In addition to that type of work that was done during lunch periods, there were emergencies, you think that came up every week or 10 days?

A. Well, it was very possible we might have one every week or 10 days, two weeks, something like that. I have got no definite dates. [185]

Q. Isn't it a fact, Mr. Mowrey, that your standing instructions to all of the men on this type of work were that in case of any emergency repair they must do it immediately?

A. That is right.

Q. And that whether they were eating their lunch or whether they were doing anything else?

A. That is right; and if it did happen during the time they were eating their lunch, then the instruction was to eat that when they got done with the job. They were to go ahead and take their lunch period.

Q. In addition to the emergency repairs there were repairs to be made constantly in that yard, weren't there, on the hoses?

A. All the time.

Q. In the case of any leak developing in the oxygen or acetylene line, that constituted a definite fire hazard, didn't it?

A. That is right.

Q. It had to be corrected immediately?

A. That is right. [186]

CLAIR IRWIN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Clair Irwin.

Mr. Sanders: May I have these time cards marked Defendant's Exhibit E for identification?

The Clerk: As a group? Do you want them separated for the individuals?

The Court: Is there a series of time cards for each individual?

Mr. Sanders: One for each shift, your Honor. They can be A, B, and C. Make Hector's E-A, isn't it?

The Court: E-1.

Mr. Sanders: E-1.

The Clerk: All of Hector's cards E-1.

Mr. Sanders: Garcia, E-2; Yates, E-3. It may be stipulated, your Honor, that the witness is qualified to testify as to the contents of the Defendant's Exhibits E, the time cards here, and the time-keeping procedure at Calship, just to save a little time.

Mr. Bertram: So stipulated. If you wish to offer them into evidence, we have no objection.

The Court: Do you offer them?

Mr. Sanders: In a minute.

The Court: Is it stipulated that they are what they purport to be on their face?

Mr. Bertram: Yes; so stipulated.

Mr. Sanders: So stipulated.

The Court: Do you offer them?

(Testimony of Clair Irwin.)

Mr. Sanders: Very well, I will offer them all into evidence.

The Court: Exhibits E-1, E-2, and E-3 for identification are received into evidence.

Mr. Sanders: Perhaps the court would like one of these to follow with the testimony?

The Court: Very well.

Direct Examination

By Mr. Sanders:

Q. Directing your attention to Defendant's E-1, Mr. Irwin, will you please state what that is? What kind of a card is it?

A. It is a tabulating card for time-keeping of the employee.

Q. Is it commonly known as a time card?

A. Time card or IBM card. [190]

Q. Was that the card that was used for all hourly-rate employees of Calship?

A. That is correct.

Q. E-1 is plaintiff Garcia, is it not—no; plaintiff Hector?

The Court: What shift was he on?

The Witness: He was on the graveyard shift.

Q. (By Mr. Sanders): How do you ascertain that on the card? A. On the very top line.

Q. Whereabouts?

A. On this card it shows the department the man was in, then it shows the badge number, then his classification and then the shift.

The Court: "Shift 1" is the graveyard shift, is it?

(Testimony of Clair Irwin.)

The Witness: No; "shift 3," sir.

The Court: Shift 3 is the graveyard shift and 2 is the swing shift and 1 is the day shift?

The Witness: And 1 is the day shift; that is correct, sir.

Q. (By Mr. Sanders): The Arabic "1" above the printed word "shift" indicates the shift that the man was on, is that correct?

A. That is right.

Q. The next column to the right of the "shift" column, what does that indicate? [191]

A. That is his rate of pay.

Q. In terms of dollars and cents, is that right?

A. That is correct.

The Court: That is the hourly rate?

The Witness: Yes, sir.

of the card you have three columns: "Actual hours worked," "allowed hours," and "total hours paid"?

A. Yes.

Q. What is inserted under "actual hours worked"?

A. Well, it is the actual hours that the man has put in for that particular period.

Q. What period does one of these cards represent, Mr. Irwin?

A. Well, we will take Hector on graveyard shift. It shows him working actually seven hours and allowing one hour premium, making the total of eight hours.

(Testimony of Clair Irwin.)

Q. These cards represent the employee's time for a day, a week, a month or what? A. A day.

Q. A day. Under "actual hours worked" are the hours inserted there that he ultimately worked on that shift, is that right, according to his time-keeping card? A. That is correct.

Q. What is the "allowed hours"; what does that represent? [192]

A. That represents, either on swing or on graveyard, to work those shifts we had a premium of a half an hour on swing and an hour on graveyard, which was "allowed time," making a total up to eight hours plus a premium of 10 per cent on swing and 15 per cent on graveyard over the hourly rate that is shown on the card.

Q. What were the working hours on the day shift, clock hours?

A. The day shift normal working hours were eight hours per day.

Q. What were the clock hours?

A. Oh, from 8:00 until 4:30.

Q. And the shift on the swing?

A. Swing was 4:30 until 12:00.

Q. And grave? A. 12:30 until 8:00.

Q. You say that swing shift was 4:30 to 12:00, or 4:30 to 12:30?

A. I am sorry. I made a mistake. It is 4:30 until 12:30. There was no omission.

Q. You state that there was a premium of 10 per cent on the swing shift and 15 per cent on the grave

(Testimony of Clair Irwin.)

shift given to the men in addition to their regular pay, is that right?

A. That is right, inducement.

Q. Also, he was allowed on the swing shift a half hour [193] time and on the graveyard shift, one hour time, for each day worked?

A. That is correct.

Q. Was that system changed at any time?

A. Yes. On November, on the week ending November the 19th, 1944, they ballooned the rates, as they called it. In other words, they changed the rate from flat rate to percentage of 10 per cent or 15 per cent. In other words, in the early days, a mechanic making \$1.20 an hour, the accounting and timekeeping division figured his rate of pay at the end of the week by adding the 10 per cent or 15 per cent. So then, in order for us to attempt to make our rates more attractive—we had a tremendous recruiting section—we thought by showing a higher rate we might be able to induce a lot of men to come to us; so we took the \$1.20 rate, and, naturally, on days they were the same, but on graveyard they blew it up and paid actually, instead of seven and one-half hours plus one-half hour allowed time, they only paid them seven and one-half hours but the rate had been ballooned so he got the same amount of pay as if he had been working under the old schedule.

The Court: That, as I understand it, the day shift, the total duration of the day shift, was eight and one-half hours?

(Testimony of Clair Irwin.)

The Witness: That is it.

The Court: Of which a half hour was lunch period?

The Witness: Lunch period. [194]

The Court: On the employee's time. Presumably he would work the full eight hours?

The Witness: That is correct.

The Court: On the swing shift the total duration of the shift was eight hours?

The Witness: Eight hours.

The Court: Of which presumably he would work seven and one-half and have a half hour; on the graveyard shift the total duration of the shift was only seven and one-half hours?

The Witness: That is correct.

The Court: Of which presumably the employee would work seven and have a half hour for lunch, but would receive pay for eight?

The Witness: For eight hours; that is correct, sir.

The Court: At the same rate. Later, instead of allowing him eight hours and paying him at the day shift rate, they increased the rate and allowed him for only the hours actually worked, is that it?

The Witness: That is correct.

The Court: That is seven hours?

The Witness: That is correct.

Q. (By Mr. Sanders): And at the time that was done, the actual rate of pay in the column I have previously referred to was changed, was it not?

A. Yes. [195]

(Testimony of Clair Irwin.)

Q. Take plaintiff Hector: Was it plaintiff Hector that was on the graveyard there, defendant's E-1? A. Yes.

Q. What was his rate prior to the week ending November 19, 1944? A. \$1.72½ per hour.

Q. What was his rate subsequent to that time? A. \$1.97.1 per hour.

Q. Then I take it, if he did not work any overtime after the change in rate, he would receive no credit in the column "allowed hours" on the time card, is that right? A. That is correct.

Q. The time that the man clocked in is indicated in the lower right portion of the time card, is that correct? A. In most cases; yes.

Q. And also, the time that he clocked out?

A. That is correct.

Q. What was the procedure required to employ a man over and beyond his regular shift time, Mr. Irwin?

A. I beg your pardon. I did not hear it.

Q. What was the procedure in the yard if it was desired to work a man over and beyond his regular shift time, in other words, overtime?

A. Well, his foreman over the particular man that was going to be employed would have to go to his superintendent and [196] request—not necessarily by name, but he would have to request 10 men, five men or one man. That would have to go in to labor management for approval, and then that approval would go to the timekeeping division, and whatever area the men were to be worked in, why,

(Testimony of Clair Irwin.)

the timekeepers would be so advised, otherwise they could not work.

Mr. Sanders: I believe that is all. Your Honor, I would just like to point out that all the time cards, E-1, -2, and -3 merely represent the day shift before the week ending November, 1944, and after that date, and the same for the grave and swing, to illustrate that the swing and grave changes were made as he testified, and the day continued the same. That is the purpose of it.

Cross-Examination

By Mr. Bertram:

Q. Mr. Irwin, no compensation was paid to any man for work on the lunch period, was it?

A. In some instances; yes.

Q. Are those the instances of which some questions have been asked with respect to getting advance authority to have work performed?

A. No; not necessarily.

Q. What instances were they?

A. Well, I don't think any of the instances would refer to this particularly. [197]

Q. Can you give me an example?

A. To this particular case, but we had many spots where we had to work men on a lunch hour and they were paid for their lunch period, but it was authorized time to work.

Q. I see. In the case of Hector, whose rate before the week ending November 19, 1944, was \$1.72 and whose rate, as shown on the card for the week

(Testimony of Clair Irwin.)

following 11-19-44 was \$1.97.1, that difference in rate did not represent an increase in pay for the man, did it? A. No.

Q. He got before that change that was made exactly the same amount of money for each hour he worked as he got after the change was made?

A. That is correct.

Q. In other words, then, Mr. Irwin, so that we understand your testimony, if Mr. Hector before the week of November 19, 1944, had come in on his graveyard shift and worked only two hours, and then gone home, he would have been paid two times \$1.97.1? A. That is right.

Q. Even though his basic rate, as shown on the card, was \$1.72?

A. Yes; that is right; that is right.

Q. That change, therefore, represented only an accounting or bookkeeping change and no real change in wages? [198]

A. That is correct.

Mr. Sanders: Just a minute. I object to that as calling for a conclusion of the witness on the very issue of what the rate is here. The facts are before the court as to what the change is. The conclusion of this witness as to what it is, I think it is immaterial, irrelevant, and calling for a conclusion of the witness.

The Court: Will you repeat the question again, please?

(Testimony of Clair Irwin.)

(Question read by the reporter.)

The Court: The objection is sustained and the answer is stricken.

Q. (By Mr. Bertram): Now, Mr. Irwin, when you state that the change was made in order to make your rates more attractive, the purpose of the change therefore was not to show that there was an increase in wages, was it?

Mr. Sanders: The same objection, your Honor, as calling for a conclusion of the witness.

Mr. Bertram: I think he knows what the purpose was.

The Court: Overruled. You may answer.

A. To the best of my knowledge, it was for two purposes: One was an accounting feature and the other, as you say, was to make the rates more attractive.

Q. (By Mr. Bertram): You are, of course, familiar with the provisions of the contract respecting the allowance of hours and the allowance of the shift premium, as you have [199] testified?

A. Yes.

Q. When the men working on a swing shift were allowed one-half hour on their time card, that was one-half hour for the work which they performed; in other words, for the seven and one-half hours which they were actually allowed, wasn't it?

A. It was the premium, the inducement to work the swing shift, we will say, a half hour plus their premium.

(Testimony of Clair Irwin.)

Q. And the same is also true of the 10 per cent premium? A. That is right.

Q. Those premiums were paid for the hours which you considered hours worked on the time card?

A. You are speaking of before November 19, 1944?

Q. Yes. A. That is correct.

Q. And your answers would be the same with respect to the graveyard shift premium?

A. That is right.

Q. None of that compensation which we have called "premiums" was given a man for any excess time beyond his regular shift which he might be required to work, was it?

A. If he was authorized to work, why, sure, he got his additional time.

Q. No. I am asking you, Mr. Irwin, about these shift premiums, the percentage premium and the time premium. Neither [200] of those premiums were given a man to compensate him for any hours he might be required to work beyond his designated shift, were they? A. No. [201]

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of June, A.D. 1949.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed C.C.A. June 6, 1949.

[Endorsed]: No. 12257. United States Court of Appeals for the Ninth Circuit. Edward R. Biggs, John R. Hector, H. J. Lueder and Martin M. Moreno, Appellants, vs. Joshua Hendy Corporation, Appellee.

Joshua Hendy Corporation, Appellant, vs. Edward R. Biggs, John R. Hector, H. J. Lueder and Martin M. Moreno, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed June 6, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 12257

E. R. BIGGS, et al.,

Appellants and Cross-Appellees,

vs.

JOSHUA HENDY CORPORATION, a Corpo-
ration,

Appellee and Cross-Appellant.

STIPULATION AND ORDER THAT CERTAIN
EXHIBITS MAY BE CONSIDERED BY
COURT WITHOUT INCLUSION IN
RECORD

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled action that plaintiffs', appellants herein, Exhibit 1, being the Master Labor Agreement, and defendant's, appellee herein, Exhibit A, being contract to build ships, and Exhibit E (1) and (2), being time cards, need not be designated for inclusion in the printed record on appeal if the above-entitled court will so order that said exhibits shall be considered in their original form without inclusion in the said printed record on appeal, since said exhibits each contain much matter extraneous to the issues involved.

In the event that this stipulation is not approved by the above-entitled Court, it is stipulated that

said exhibits shall be included in the printed record on appeal.

Dated: June 23, 1949.

MOHR & BORSTEIN &
PERRY BERTRAM.

By /s/ PERRY BERTRAM,

Attorneys for Appellants and
Cross-Appellees.

THELEN, MARRIN, JOHNSON
& BRIDGES.

By /s/ ROBERT H. SANDERS,

Attorneys for Appellee and
Cross Appellant.

It is so ordered, and the exhibits herein named will be considered in their original form without their being printed in the record on appeal.

Dated: June 24, 1949.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ W. E. ORR,

U. S. Circuit Judges.

[Endorsed]: Filed July 5, 1949.

[Title of Court of Appeals and Cause.]

CROSS-APPELLANT'S POINTS ON APPEAL

Cross-Appellant in the above-entitled action, in compliance with Rule 19, Subdivision 6 of the Rules of Practice of the above-entitled Court, submits its Points on Appeal.

The District Court erred as follows:

(1) In ruling that Cross-Appellees' activities were subject to the Fair Labor Standards Act of 1938, as amended.

(2) In ruling that any of the Cross-Appellees or the Cross-Appellant were engaged in the production of goods for interstate commerce or in processes and occupations necessary to such production within the meaning of the Fair Labor Standards Act of 1938, as amended.

(3) In ruling that the one-half hour lunch period taken by Cross-Appellees was a compensable activity within the meaning of the Fair Labor Standards Act of 1938, as amended.

(4) In ruling that Section 2 (d) of the Portal-to-Portal Act of 1947 did not deprive the Court of jurisdiction of Cross-Appellees' action.

(5) In ruling that the one-half hour lunch period taken by Cross-Appellees was a compensable activity by reason of an express provision of the written contract in effect at the time between Cross-Appellees' collective-bargaining representatives and Cross-Appellant, within the meaning of Section 2 of the Portal-to-Portal Act of 1947.

(6) In ruling that Cross-Appellee Edward R. Biggs performed compensable activities, for which he was not compensated, each and every day of his employment, by Cross-Appellant during the period in issue.

Dated: July 12, 1949.

THELEN, MARRIN, JOHNSON
& BRIDGES.

By /s/ ROBERT H. SANDERS,
Attorneys for Appellee and
Cross-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 13, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL ON
BEHALF OF APPELLANTS

The appellants hereby designate the following points on appeal:

1. The Court erred in reaching the following conclusion of law:

“6. The defendant is entitled to credit against all of the half hour lunch periods worked by any of the plaintiffs on the swing shift by reason of the half hour premium paid to said plaintiffs pursuant to paragraph V (c) of the Collective Bargaining Agreement relative to ‘second shift’ * * *”

2. The court erred in reaching the following conclusion of law:

“7. The defendant is entitled to credit against all of the half hour lunch periods worked by any of the plaintiffs on the graveyard shift by reason of the one hour premium paid to said plaintiffs pursuant to paragraph V (c) of the Collective Bargaining Agreement relative to ‘third shift’ * * *”

3. The Court erred in reaching the following conclusion of law:

“8. Plaintiffs, Edward R. Biggs, H. J. Lueder and Martin M. Moreno, are not entitled to recover any unpaid overtime wages or liquidated damages by reason of the fact that their lunch periods were worked on the swing shift or on the graveyard shift during their entire periods of employment, and plaintiffs, John S. Garcia and John R. Hector, are not entitled to recover any unpaid overtime wages or liquidated damages for the portion of their employment worked by them on the swing shift or graveyard shift.”

4. The Court erred in failing to find as a matter of fact that none of the plaintiffs received any compensation for the services performed by them during the half hour lunch periods.

5. The Court erred in failing to conclude as a matter of law that the one half hour additional compensation paid to appellants who were on the swing shift was paid as additional compensation for the hours actually credited to them excluding their lunch period and served to increase their regular rate of pay.

6. The Court erred in failing to conclude as a

matter of law that the one hour additional compensation paid to appellants who were on the graveyard shift was paid as additional compensation for the hours actually credited to them excluding their lunch period and served to increase their regular rate of pay.

7. The Court erred in failing to award judgment for overtime for lunch periods worked by each of the appellants herein.

Respectfully submitted,

MOHR AND BORSTEIN and
PERRY BERTRAM.

By /s/ PERRY BERTRAM,

Attorneys for Appellants.

[Endorsed]: Filed July 14, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION DESIGNATING RECORD TO
BE PRINTED ON APPEAL

It Is Hereby Stipulated, by and between appellants and cross-appellees and appellee and cross-appellant, that the following pleadings and exhibits be prepared as the record on the appeal and on the cross-appeal:

1. Second Amended Complaint. Filed 6/30/48.
2. Answer to Second Amended Complaint. Filed 7/28/48.
3. Pre-Trial Stipulation of Facts and Issues. Filed 6/7/48.

4. Order on Pre-Trial Proceedings. Filed 7/13/48.
5. Findings of Fact and Conclusions of Law. Filed 2/21/49.
6. Judgment. Filed 2/21/49.
7. Notice of Appeal. Filed 3/22/49.
8. Dismissal of Appeal of John S. Garcia. Filed 5/6/49.
9. Notice of Cross-Appeal. Filed 4/13/49.
10. Order Extending Time to Prepare Record. Filed 4/27/49.
11. Stipulation and Order That Exhibits Be Considered by the Court Without Being Printed in the Record on Appeal.
12. Statement of Appellants' Points on Appeal.
13. Statement of Cross-Appellants' Points on Cross-Appeal.

The following portions of the Reporter's Transcript of the Trial:

- (a) Commencing on page 14, line 8, and ending on page 21, line 20, inclusive.
- (b) Commencing on page 22, line 5, and ending on page 38, line 14, inclusive.
- (c) Commencing on page 58, line 1, and ending on page 67, line 23, inclusive.
- (d) Commencing on page 68, line 17, and ending on page 87, line 10, inclusive.
- (e) Commencing on page 93, line 11, and ending on page 105, line 13, inclusive.
- (f) Commencing on page 107, line 12, and ending on page 112, line 3, inclusive.

- (g) Commencing on page 114, line 10, and ending on page 115, line 16, inclusive.
- (h) Commencing on page 117, line 12, and ending on page 121, line 2, inclusive.
- (i) Commencing on page 127, line 1, and ending on page 152, line 15, inclusive.
- (j) Commencing on page 160, line 10, and ending on page 169, line 25, inclusive.
- (k) Commencing on page 171, line 11, and ending on page 177, line 11, inclusive.
- (l) Commencing on page 177, line 16, and ending on page 180, line 8, inclusive.
- (m) Commencing on page 181, line 21, and ending on page 186, line 20, inclusive.
- (n) Commencing on page 189, line 5, and ending on page 201, line 4, inclusive.

Dated: July 14, 1949.

MOHR AND BORSTEIN and
PERRY BERTRAM.

By /s/ DAVID L. MOHR,
Attorneys for Appellants and
Cross-Appellees.

THELEN, MARRIN, JOHNSON & BRIDGES—
SAMUEL S. GILL and ROBERT H. SANDERS.

By /s/ ROBERT H. SANDERS,
Attorneys for Appellee and
Cross-Appellant.

[Endorsed]: Filed July 19, 1949.



No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and
MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF

MOHR & BORSTEIN and
PERRY BERTRAM,

1151 South Broadway, Los Angeles 15,

Attorneys for Appellants.



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No. 12257
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and
MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF

I.

**Statement of Basis of Original and Appeal
Jurisdiction.**

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.¹ Jurisdiction vested in the District Court by that section and by section 24 (8) of the Judicial Code (28 U. S. C., Section 41 (8)). Section 2 of the Portal-to-Portal Act of 1947² did not withdraw jurisdiction of the claims of the appellants herein.

This court has jurisdiction of the appeal under the provisions of Section 128 of the Judicial Code (28 U. S. C., Section 225).

¹Public No. 718, 75th Cong., Chap. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Secs. 201-219.

²Pub. Law 49, 80th Cong., Chap. 52.

II.

Statement of the Case.

The question involved in this appeal³ is the following: Was the employer entitled to take credit for the extra compensation paid to employees for their regular hours on the swing shift and graveyard shift against the overtime compensation due them for the half hour lunch periods which they worked?

This issue is raised by Finding of Fact No. 5 [Tr. p. 17], setting forth the pertinent provisions of the collective bargaining agreement, Finding of Fact No. 6 [Tr. p. 20], finding that the plaintiffs, including these appellants, received no compensation for the half hour lunch periods, Finding of Fact No. 7 [Tr. p. 21], finding that each of the appellants was on duty and performed services for the appellee during his lunch periods, Conclusions of Law Nos. 6 and 7 [Tr. pp. 24 and 25], concluding that the appellee was entitled to credit against the half hour lunch periods worked by the appellants by reason of the shift differentials paid to said appellants, and by the judgment [Tr. p. 26] which denies these appellants compensation for their half hour lunch periods worked upon the swing and graveyard shifts.

³No attempt is made here to set forth the question raised by the cross-appeal.

III.

Statement of Facts.

Appellants were employed by appellee, Joshua Hendy Corporation, then known as California Shipbuilding Corporation, in its shipbuilding yard at Wilmington, California, in various occupations necessary for the production of ships [Tr. p. 7]. The ships built by this yard were, upon completion, delivered to the United States Maritime Commission, and thereafter were sent from the State of California to points outside the State of California [Tr. p. 7].

The appellants were required, by their employer, to perform duties during their regular lunch periods which the collective bargaining agreement set aside for all employees. During such lunch periods they were not excused or relieved from their duties for the purpose of taking lunch or otherwise, and each of them performed the duties for which they were hired during such lunch periods [Tr. p. 21; p. 57 *et seq.*; p. 66 *et seq.*; p. 79 *et seq.*; p. 103 *et seq.*].

The appellants were employed on the swing (second) shift and graveyard (third) shift.⁴

The collective bargaining agreement governing the employment of the appellants by the appellee contained the

⁴For a portion of his employment, Appellant Hector was employed on the day shift and recovered a judgment in this action based upon the time worked while employed on the day shift. No issue is raised by this appeal concerning this portion of the judgment.

following provisions defining the shifts and providing for extra compensation on account of swing shift and graveyard shift work:

“5. Shift work.

“ . . .

“(c) First or regular daylight shift: An eight and a half ($8\frac{1}{2}$) hour period less thirty minutes for meals on the employee's time. Pay for a full shift period shall be a sum equivalent to eight (8) times the regular hourly rate with no premium.

“Second Shift: An eight (8) hour period less thirty minutes for meals on employee's time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

“Third Shift: A seven and one-half ($7\frac{1}{2}$) hour period less thirty minutes for meals on employee's time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).

“(d) For work on any shift less than the full shift period, pay shall be the corresponding proportionate part of the pay for the full shift period, provided such amount be not less than the minimum pay prescribed in Paragraph 10 hereof.”

The day shift began at 8:00 a.m. and terminated at 4:30 p.m. The swing shift began at 4:30 p.m. and continued until 12:30 a.m. The graveyard shift began at 12:30 a.m. and ended at 8:00 a.m. [Tr. p. 151]. In accordance with the contract, the appellee paid to em-

employees working on the swing shift additional compensation equal to 10% of the base rate plus one half hour. Employees on the graveyard shift received extra compensation equal to 15% of the base rate plus one hour.⁵ Prior to November 19, 1944, the employees' time cards showed their rates of pay as being the base rates plus the percentage differential. In computing their weekly compensation the timekeeping department added the time differential as "allowed hours" [Tr. pp. 151-152].⁶ After November 19, 1944, the appellee "ballooned" the rates by including the time differential [Tr. p. 152]. The result was that the employees' time cards following November 19, 1944, reflected the true rate of pay at which each of them was employed.

This change represented merely an accounting or book-keeping change and did not reflect any change in the employees' wages [Tr. pp. 156-157]. For example, Hector's time card rate prior to November 19, 1944, was shown as \$1.725 per hour, and after November 19, 1944, as \$1.971

⁵Hereafter, for convenience and simplicity, both the percentage premiums of 10% and 15% respectively and the time premiums of one half hour and one hour respectively, will be referred to as "shift differentials" unless the context requires that the particular type be specified.

⁶Irwin's testimony indicates that the time card rate was exclusive of both the percentage and the time differential, but a simple mathematical computation establishes that the percentage was included. For example, Hector's time card rate of \$1.725 is "ballooned" to \$1.971 time card rate by adding one hour, thus: $1.725 \times 8 = 13.800 \div 7 = 1.971$. His "base rate" was \$1.50.

per hour [Deft. Ex. E(1)]. Actually he received both before and after November 19, 1944, for each hour of work for which he was credited, the \$1.971 rate shown after that date [Tr. pp. 155-156].

This “ballooning” was to make it appear that higher rates were being paid, even though the rates were actually the same, so that employees would be attracted to seek employment with appellee [Tr. p. 157].⁷

The sole function of the shift differential was to serve as an inducement to work the undesirable hours [Tr. pp. 157-158].

They were not given as compensation for any hours which an employee might be required to work beyond his regularly designated shift hours [Tr. p. 158].

IV.

Summary of Argument.

The shift differentials were paid solely by way of inducement to work undesirable hours and were paid only for the hours credited to the employees. They were not paid for time which was not worked. They were not paid as compensation for hours which employees were required to work beyond their regularly designated shift hours. They were not paid as overtime. Accordingly, they could not be offset against overtime but served to increase the “regular rate” computed by including the shift differential.

⁷The employer could not legally raise the wages because of War Manpower Commission Regulations.

V.

Argument.

1. The Shift Differentials Were Not Overtime Payments.

The Supreme Court has defined overtime premium as “extra pay for work because of previous work for a specified number of hours in the work week or work day.”⁸

Bay Ridge Operating Co. v. Aaron (1948), 334 U. S. 446, 465.

Obviously, neither of the differentials paid to employees on the swing and graveyard shifts were paid by reason of the number of hours previously worked by them during the work week. By the express terms of the contract, the employees received those differentials if they worked only one or two hours in the week [Pltf. Ex. 1, Par. 5 (d); see Tr. p. 20].

This precise point was considered and determined by the Supreme Court in the *Bay Ridge* case where the Court said:

“* * * A mere higher rate paid as a job differential or as a shift differential or for Sunday or holiday work is not an overtime premium.” (334 U. S. 446, 465.)

In that case the Court gives the example of watchmen on the day shift and the night shift, indicating that the extra pay, even though it might be time and one-half the rate of the day watchmen, which the night watchmen receive, is the regular rate. It is extra pay for undesirable hours,

⁸Unless otherwise specifically indicated, the word “overtime” will be used in this brief as so defined.

simply a shift differential. It would not be overtime premium pay but would be included in the compensation of the "regular rate" for determining overtime premium for any excess hours.⁹

Bay Ridge Operating Co. v. Aaron (1948), 334
U. S. 446, 468-469.

2. Shift Differentials Are Part of the Regular Rate of Pay and Cannot Be Claimed as an Offset Against Overtime Compensation Due.

Since the additional sums which are paid, as in this case, for work during undesirable hours do not constitute "overtime" within the meaning of the Fair Labor Standards Act, they must be included in the determination of the "regular rate" for the purpose of computing overtime compensation due under Section 7 of the Act.

Bay Ridge Operating Co. v. Aaron (1948), 334
U. S. 446;

Cabunac v. National Terminals Corp. (C. C. A.
7th, 1944), 139 F. 2d 853;

Roland Electrical Co. v. Black (C. C. A. 4, 1947),
163 F. 2d 417;

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1944), 54 Fed. Supp. 1022;

Ferrer v. Waterman S. S. Corp. (D. C. Puerto
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on other grounds, 76 Fed. Supp. 601);

Burke v. Mesta Machine Co. (D. C. Pa., 1948),
79 Fed. Supp. 588.

⁹This has consistently been the position of the Administrator of the Wage-Hour Division. See, Opinion Letters: August 17, 1945, referred to C. C. H. Labor Law Service ¶ 25,540.69; August 30, 1948, *Ibid.* ¶ 25,540.693; March 5, 1942, *Ibid.* ¶ 25,540.651.

It follows, of course, that if such extra compensation is to be included in the "regular rate" of pay, it, as well as the "base rate," is the compensation due the employee for each hour which he works. If the employee is entitled to his base rate and his extra compensation as shift differential for each hour which he works, then the employer cannot require him to work additional hours without compensation on the theory that the shift differential pays for such extra hours.

In the case at bar, it was never intended or contemplated by the parties, and nothing contained in the contract or the method of operation thereunder can give any inference, that the shift differentials were designed as a "cushion" on the basis of which the employer could claim additional hours of work beyond those established in the contract without paying for them. Indeed, the contract makes it very clear that for any work performed over and above the stipulated contract hours, the employer would be required to pay additional compensation at the rate of time and one-half [Pltf. Ex. 1, par. 4].

In this case the "regular rate" of the employees, whether on day shift, swing shift or graveyard shift, is determined by dividing the wages actually paid to them, exclusive of overtime, by the hours actually worked in any work week.

Bay Ridge Operating Co. v. Aaron (1948), 334 U. S. 446, 459-460.

For example, Hector's regular rate is computed as follows: 8 hours \times base rate of \$1.50 = \$12.00 \div 7 hours on third shift = \$1.714 + 15% or .257 = \$1.971. This is precisely the formula which the employer here used to determine the employees' regular rate [Tr. p. 152, Deft. Ex. E(1)].

3. The Decision in *Mills v. Joshua Hendy Corp.*

In *Mills v. Joshua Hendy Corp.* (1948), 169 F. 2d 898, this Court stated that the additional compensation per week paid by the employer pursuant to the contract to an employee on the graveyard shift could be offset against the additional one and one-half hours per week which the employer required Mr. Mills to work without compensation.

Upon the basis of the following considerations, we respectfully submit that this holding is contrary to controlling law, is not sound in principle, and should be overruled.

The record in the *Mills* case reveals that the employer did not question the correctness of the District Court's ruling which allowed additional compensation for the graveyard shift work on the basis here urged. Accordingly, neither counsel for the employer nor counsel for the employee discussed the problem in their briefs nor argued it orally before the Court. While it is true that in a petition for rehearing the employee therein pointed out to this Court that its decision was in conflict with the decision of the Supreme Court in *Bay Ridge Operating Co. v. Aaron*, *supra*, a rehearing was not granted and counsel did not have the opportunity of arguing the conflict between the two holdings. The decision is also in conflict with the decisions cited *supra* page 8, and the opinions of the Administrator of the Wage-Hour Division, cited in Footnote 9. Counsel is aware of no decision allowing such credit under these facts.

Furthermore, in principle, the employer would only be entitled to claim an offset if the extra compensation were "excess" payment and not part of the regular rate. If it

was paid as part of the regular rate, then a proportionate part thereof was due to the employee for each hour he worked. If it was due to him for each of his regularly scheduled hours of work, the employer could not claim it as an offset. In both the *Mills* case and in the case at bar, the employer and employee stipulated that the shift differential was part of the regular rate of pay.

To follow the *Mills* holding to its logical conclusion, the employer would, on the theory that the extra pay was "excess" compensation, be not only entitled to offset it against overtime but would be entitled to judgment against the employee for the balance.

In *Mills*, the Court stated that it appeared "that Mills received for his 45 hours work in each week on the graveyard shift pay for 40 hours straight time and 8 hours overtime, or, compensation in each week of $2\frac{1}{2}$ hours of straight time for which he did no work and was not on the job, and $\frac{1}{2}$ hour overtime for which he did no work and was not on the job. Appellant should not be required to *again* compensate for work not performed."

The facts clearly establish, however, and the parties stipulated that Mills did not receive any compensation for hours in which he did no work and was not on the job. On the contrary, the $2\frac{1}{2}$ hours straight time and the $\frac{1}{2}$ hour overtime of which the Court spoke were in that case, and are in this case, compensation for the regular hours of work which the employee was scheduled to and did perform. The employee *did not* receive compensation for work not performed. Since this question was not raised by the parties in the *Mills* case, the record there did not perhaps establish as clearly as it does here that none of the employees received any compensation what-

soever for work not performed. No other inference can be drawn from the stipulation of the parties as to the regular rate of pay, and indeed Mr. Irwin, the employer's own witness, testified that none of the employees received compensation for work not performed.

“Q. No. I am asking you, Mr. Irwin, about these shift premiums, the percentage premium and the time premium. Neither of those premiums were given a man to compensate him for any hours he might be required to work beyond his designated shift, were they? A. No.” [Tr. p. 158.]

For the foregoing reasons, the differentials are not available to the employer as an offset but must be included in the regular rate of pay. Accordingly, we respectfully urge this Court to overrule that portion of the decision of *Mills v. Joshua Hendy Corp.* which held the employer entitled to credit this payment against overtime compensation due.

4. The “Overtime on Overtime” Act of 1949.

Following the decision in *Bay Ridge Operating Co. v. Aaron* (1948), 334 U. S. 446, Congress enacted the so-called “Overtime on Overtime” Act.¹⁰

This law added sub-section (e) to Section 7 of the Fair Labor Standards Act of 1938 as follows:

“(e) For the purpose of computing overtime compensation payable under this section to an employee—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the work week, at a premium rate not less than one and

¹⁰Public Law 177, Chapter 352, 81st Congress, 1st Session.

one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

While this section is too new to have case law interpreting it, there is available for consideration the interpretations of the Administrator of the Wage Hours Division, U. S. Department of Labor.¹¹ As the Supreme Court has held, these opinions, while not binding upon the court, are persuasive and are entitled to great weight.

U. S. v. American Trucking Assn., 310 U. S. 554.

The Administrator points out that the Amendment is concerned only with certain premium payments that meet requirements of the new Section 7 (e) but does not

Where reference is made in this section to the Administrator's opinion, the same is found in Section 778.1, Title 29, Chapter V, Subchapter B, as published in the Federal Register, August 11, 1949.

soever for work not performed. No other inference can be drawn from the stipulation of the parties as to the regular rate of pay, and indeed Mr. Irwin, the employer's own witness, testified that none of the employees received compensation for work not performed.

“Q. No. I am asking you, Mr. Irwin, about these shift premiums, the percentage premium and the time premium. Neither of those premiums were given a man to compensate him for any hours he might be required to work beyond his designated shift, were they? A. No.” [Tr. p. 158.]

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¹¹Where reference is made in this section to the Administrator's opinion, the same is found in Section 778.1, Title 29, Chapter V, sub-chapter B, as published in the Federal Register, August 11, 1949.

otherwise affect the applicability of the judicially established principles in reference to overtime compensation.

Under this Amendment, we are not concerned with the first type of "extra compensation," that is, payments for Saturday, Sunday, holidays, or on the sixth or seventh day of the work week. The payments involved here were payments for every hour the employee worked no matter on which day of the week.

With respect to the "extra compensation" described in the second sub-paragraph of the Amendment, the first question is whether or not the premium here involved was for work "outside of the hours established in good faith by the contract or agreement as the basic, normal or regular work day." In this case the employer maintained a 24 hour continuous operation. By the terms of the contract these 24 hours were divided into 8, 7½ and 7 hour shifts (each shift having, theoretically, a one-half hour lunch period). Each shift, therefore, was the "basic, normal or regular work day" for the employees on that particular shift.

In the *Bay Ridge* case, the Government argued that "regular working hours," meaning the day shift, established the straight time rate. In rejecting this argument, the Supreme Court pointed out its obvious defect in that it treated of the entire group instead of the individual workmen. "The straight time hours can be the regular working hours only to those who work in those hours. The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual" (page 473). In other words, the "regular work day" consists of the hours which each employee is regularly scheduled to work.

Inasmuch as Congress had this decision in mind in enacting the foregoing Amendment to Section 7, it can only be concluded that Congress intended "regular work day" to mean the hours regularly established for any particular employee. In this case, therefore, the swing shift and the graveyard shift were the "basic, normal or regular work day" within the meaning of Section 7 (e) of the Act for the appellants who normally worked those shifts.

Since, therefore, the extra payments here involved were not additional compensation for work outside of the hours established as the regular work day, the employer is not entitled to credit them against overtime compensation due by virtue of this Amendment.

There exists still another reason why the employer cannot claim this credit. The same sub-section of the Act requires the extra payment to be "at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such work day or work week." Neither the percentage differential nor the time differential nor the two of them combined when added to the original basic rate amounted to a premium rate of not less than one and one-half times the basic rate.¹²

As the Administrator stated in the opinion above referred to:

"Where the premium rate is less than one and one-half times such nonovertime rate of pay, the extra compensation provided by such rate must be

¹²In Hector's case, the time differential amounted to 21.4¢, the percentage to 25.7¢. A "premium rate not less than one and one-half times" his base rate would be an additional 75¢ or a total of \$2.25 instead of \$1.971.

included in determining the employee's regular rate of pay, and cannot be credited toward statutory overtime compensation due, unless it qualifies as a true overtime premium under the principles announced in the *Bay Ridge* decision. * * *

Accordingly, since the shift differentials here involved were not "true overtime premiums" under the principles announced in the *Bay Ridge* decision, since they were not paid for work outside of the basic, normal or regular work day and since they were less than one and one-half times the basic rates of pay, nothing contained in Section 7 (e) permits the employer to offset the shift differentials against earned overtime compensation.

5. Appellants' Counsel Are Entitled to Further Attorneys' Fees on Appeal.

It is the function of this Court to fix a reasonable sum as the value of the legal services rendered to the appellants by their counsel upon this appeal.

E. H. Clarke Lumber Co. v. Kurth (C. C. A. 9, 1945), 152 F. 2d 941;

Republic Pictures Corp. v. Kappler (C. C. A. 8, 1945), 151 F. 2d 543;

Stanger v. Vocafilm Corp. (C. C. A. 2, 1945), 151 F. 2d 894.

Counsel for appellants respectfully request that an order be made that appellee be required to pay an additional sum in an amount to be determined by the Court for the services of appellants' attorneys on this appeal.

Conclusion.

The appellants have established that the shift differentials involved herein were not true overtime payments under the principles laid down by the Supreme Court. They were, on the contrary, extra compensation paid because of the disagreeable hours. As such, they were part of the compensation paid to each of the appellants for the hours which appellants were regularly scheduled to work. They, therefore, became a part of the regular rate of pay.

That portion of the decision in *Mills v. Joshua Hendy Corp.* which deals with the time differential paid to graveyard shift employees does not take the foregoing facts into consideration. It erroneously concluded that the time differential was paid for hours not worked. In this case, the testimony shows clearly, the Court found, and indeed the effect of the parties' stipulation was that none of this extra compensation was for time not worked but was paid for the regularly scheduled hours actually worked. This portion, therefore, of the *Mills* decision should be overruled.

The shift differentials here involved are not the extra compensation which the Section 7 (e) amendment to the Act permits to be treated as overtime compensation for the purpose of computing the regular rate of pay.

It is respectfully submitted, therefore, that under the principles established by the Supreme Court in *Bay Ridge Operating Co. v. Aaron, supra*, the facts presented to this

Court entitle the appellants herein to judgment for the additional hours which they worked during their lunch periods on the swing and graveyard shifts and for which they received no compensation whatsoever.

Respectfully submitted,

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By PERRY BERTRAM,

Attorneys for Appellants.

No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and
MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

BRIEF OF APPELLEE AND CROSS- APPELLANT.

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DEC 1 1949

PAUL P. O'BRIEN,

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No. 12257

IN THE

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MARTIN M. MORENO,

Appellants,

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Appellee.

BRIEF OF APPELLEE AND CROSS- APPELLANT.¹

PART I—REPLY TO APPELLANTS' OPENING BRIEF.

I.

Basis of Original and Appellate Jurisdiction.

This is an appeal from the final judgment [Tr. pp. 26-28] and the Findings of Fact and Conclusions of Law [Tr. pp. 15-26] entered in this proceedings by the United States District Court for the Southern District of California, Central Division, on February 21, 1949.

¹This brief is in two parts; the first part is appellee's reply brief and the second part is cross-appellant's brief.

Appellants contended in the District Court that said Court had jurisdiction of this action under the Fair Labor Standards Act of 1938 (Public Law 718, 75th Cong., 52 Stat. 1060-69; 29 U. S. C. Secs. 201-219) and the provisions of Section 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8)) [Tr. pp. 2-3]. Appellee contended in the District Court [Tr. p. 13] and now contends that the District Court did not have jurisdiction of this action by reason of Sec. 2(d) of the Portal-To-Portal Act of 1947 (Pub. Law 49, 80th Cong., Chap. 52; 29 U. S. C. A. 251), amending the Fair Labor Standards Act.

This Court has jurisdiction of the appeal and cross-appeal under provisions of Section 1291 of the Judicial Code and Judiciary (28 U. S. C. 1291).

II.

Statement of Facts.

Appellee will not restate the facts recited in appellants' Opening Brief (pp. 3-6) except as to certain corrections and additions deemed material.

All of the appellants were members of unions who were signatories to the closed shop (A. F. of L.) Master Labor Agreement [Ex. 1]. The unions had stewards at all times in the shipyard of appellee to see that said agreement was being complied with [Tr. pp. 43, 66, 77]. In fact, one of the appellants herein was a union steward [Tr. pp. 109-110]. Further, appellants knew that they were not receiving compensation for the lunch period time since their weekly pay checks set forth the exact number of hours

for which they were being paid [Tr. p. 46]. Yet during all of the war years in which the Master Labor Agreement [Ex. 1] was in effect, no complaint was ever filed by any union or employee, as to the claim appellants now assert, under the provisions for arbitration of complaints expressly provided in said Master Labor Agreement [Ex. 1] in Paragraphs 18 and 19 thereof [Tr. p. 95 *et seq.*].

Appellants had the right to attend their union meetings and complain of non-payment for their lunch periods, but no such complaints were made by them [Tr. pp. 48-49, 65, 76, 109-110].

The hourly rate of appellants was as shown on their time cards [Ex. E] set forth at the top of each man's time card [Tr. p. 150]. Prior to the work week ending November 19, 1944, the hourly rate of pay for swing and graveyard shifts did not include the one-half hour and one hour "allowed time" [Tr. p. 151] credited respectively upon the swing and graveyard shifts. After the work week ending November 19, 1944, no "allowed time" was credited and the actual hourly rate was increased for these two shifts [Tr. p. 152].

Prior to the work week ending November 19, 1944, it is incorrect, as appellants seek to do, to speak of the 10% and 15% shift premiums for swing and graveyard shifts, respectively, and the one-half hour and one hour "allowed time" as *both* being shift differentials (the term shift differential being used in the sense of an increase in the actual hourly rate of pay). Only the 10% and 15% shift

premiums were shift differentials [Tr. p. 151]. Appellants stated in their Opening Brief that in the case of *Mills v. Joshua Hendy Corporation* (C. C. A. 9th, 1948), 169 F. 2d 898, and also in the case at bar it was stipulated that the "allowed time" was a shift differential. Appellee respectfully believes that counsel is in error and that there is no such stipulation in either the *Mills* case, *supra*, or in the case at bar.

III.

Summary of Argument.

Appellants have already been properly compensated for the one-half hour lunch period on the swing and graveyard shifts as this Court expressly held in the *Mills* case, *supra*, upon the same pleadings and facts as are now before the Court in the case at bar. The 1949 amendments to the Fair Labor Standards Act affirms the *Mills* case, *supra*.

IV.
ARGUMENT.

Appellee agrees with appellants' contention that shift differentials cannot be used as a credit for overtime premium due under the Fair Labor Standards Act. However, appellee disagrees with appellants' reasoning that the one-half hour and one hour time credits on the swing and graveyard shifts, respectively, are shift differentials, that is, constitute higher hourly rates of pay.

The rates of pay of these appellants was set forth on their time cards [Tr. p. 150; Ex. E]. Appellants received their weekly pay checks showing the number of overtime hours for which they were being paid [Tr. p. 46]. Further, the second amended complaint of appellants affirmatively alleges these facts in practically the same language used in the complaint in the *Mills* case, *supra*, alleging in Paragraph IV [Tr. p. 4]:

“In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours, for forty (40) hours of which they were paid at straight time, and eight (8) hours of which they were paid at time and one-half. In each week of their employment by the defendant, the plaintiffs and said other employees similarly situated worked hours in addition to said forty-eight (48) hours for which they were credited and paid, for which additional hours they were not credited and for which they received no compensation whatsoever.”

And, further, the District Court's Conclusions of Law, Nos. 6 and 7, so found [Tr. pp. 24, 25], supports this contention.

Conceding lunch period time to be time worked for purpose of illustration, the appellants thus worked the fol-

lowing hours: swing shift, 4:30-12:30 = 8 hours X 6 days = 48 hours; graveyard shift, 12:30-8:00 = 7½ hours X 6 days = 45 hours. Therefore, there is no evidence of hours worked by appellants as to the swing or graveyard shifts in excess of forty-eight hours per week for which they were not properly paid; because on both the swing and graveyard shifts they were credited and paid for forty-eight hours of work, with overtime at time and one-half for the eight hours in excess of forty.

Appellant seeks to attack the swing and graveyard rates of pay as mere bookkeeping transactions. The Wage and Hour Administrator made a similar attack in *McComb v. Pacific and Atlantic Shippers Assoc.* (C. C. A. 7th, 1949), 175 F. 2d 411. There the employees were paid on the basis of forty-eight hours worked a week with time and one-half for the eight hours over forty. It was stipulated that the employees worked less than forty-eight hours per week but in excess of forty. The Court held the method of payment did not violate the Fair Labor Standards Act.

Effect of 1949 Amendments to the Fair Labor Standards Act.

The Eighty-first Congress amended the Fair Labor Standards Act in several important particulars by Public Law 393, First Session, effective January 25, 1950.²

²These new amendments are discussed since it is assumed the Court will not pass on this case until after the effective date of these new laws.

Section 16(f) of this new law repeals the 1949 Overtime on Overtime Law providing:

“Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.”

Section 16(e) expressly requiring for *retroactive* effect provides:

“No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7(d)(6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.”

Thus, this section relieves appellee if the compensation paid by it was “*at least equal to*” the sum required by Section 7(d)(6) (7) and 7(g). Section 7(d)(6) is believed applicable to the case at bar and provides:

“Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the work week, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;”

It will be recalled that premium pay of one and one-half the established hourly rate was paid by appellee for 8 hours on the sixth day of the work week [Ex. 1, par. 4]. This pay for the sixth day more than paid for appellants' overtime hours on the graveyard shift and properly paid appellants for the swing shift. For simplicity of illustration, assume a \$1.00 an hour rate:

1. Swing shift pay for sixth day: 8 hours worked (including lunch period) $\times \$1.00 \times 1\frac{1}{2} = \12.00 . Total hours worked in week, 8 hours $\times 6 = 48$; $1\frac{1}{2}$ pay required for 8 hours in excess of 40 which is \$12.00. Total pay paid by appellee for work week is \$40.00 for first 5 days + \$12.00 for sixth day = \$52.00. Total pay required by the Act = \$52.00.

2. Graveyard shift pay for sixth day: $7\frac{1}{2}$ hours worked (including lunch period) $\times \$1.00 \times 1\frac{1}{2} = \10.75 . Total hours worked in week, $7\frac{1}{2}$ hours $\times 6 = 45$; $1\frac{1}{2}$ pay required for 5 hours in excess of 40 = \$7.50. Total pay paid by appellee for work week is \$40.00 for first five days + \$12.00 for sixth day = \$52.00. Total pay required by the Act = \$47.50.

It is submitted that these illustrations conclusively show that appellants have been properly paid for their lunch period time, when appellee is credited with the compensation actually paid to appellants, as provided by Section 16(e) of the new law, *supra*.

PART II—CROSS-APPELLANT'S OPENING BRIEF.

I.

Basis of Original and Appellate Jurisdiction.

The statement of appellee and cross-appellant on this subject is set forth in Part I of appellee's Reply Brief, *supra*, and is herein relied upon.

II.

Statement of Cross-Appellant's Case.

A. QUESTIONS INVOLVED AND HOW RAISED.

(1) Were cross-appellees' activities subject to the Fair Labor Standards Act? This issue is raised by the pleadings and also the Findings of Fact and Conclusions of Law.

(2) Were cross-appellees' activities, while in cross-appellant's employ, in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act? This issue is raised by the pleadings and the Findings of Fact and Conclusions of Law.

(3) Is the lunch period time, claimed as time worked by cross-appellees, a compensable activity by reason of an express provision of the Master Labor Agreement [Ex. 1] within the meaning of Section 2 of the Portal-to-Portal Act of 1947? This issue likewise is raised by the pleadings and the Findings of Fact and Conclusions of Law.

(4) Does Section 2(d) of the Portal-to-Portal Act of 1947 deprive the District Court of jurisdiction of this ac-

tion? This issue is also formed by the pleadings and the Conclusions of Law.³

(5) Whether or not there is any evidence in the record at all to support the Findings of Fact [Tr. p. 21] that cross-appellee EDWARD R. BIGGS worked during his lunch period *every* day during his employment by cross-appellant. This issue is formed by the Findings of Fact.

III. ARGUMENT.

Each of the questions presented by cross-appellant will be argued separately and in the order set forth above, except questions "3" and "4" will be argued as one question.

(a) Are the Cross-Appellees Covered by the Fair Labor Standards Act?

1. Summary of Argument.

Cross-appellees were government contract employees who cannot take advantage of the provisions of the Fair Labor Standards Act since cross-appellees were covered by a special Federal Act regulating their pay. This latter Federal Act was based on the power of the United States Government to administer its own business relations and controls only those who contract with the Government; whereas the Fair Labor Standards Act is an exercise of the commerce power of Congress and is directed toward private industry in general.⁴

³It may be noted that the answer to "3," above, automatically answers this question.

⁴Since the case relied upon had not then been decided, this defense was not raised in the District Court.

2. Argument.

The basis of this contention is set forth in the case of *U. S. Cartridge Company v. Powell* (C. C. 8th 1949), 174 F. 2d 718; cert. granted (U. S. Sup. Ct.) 10/10/49. In that case, an action for overtime wages under the Fair Labor Standards Act, the employees were engaged in the manufacture of munitions for a war contractor employed by the United States Government under a cost-plus-fixed-fee contract. The Walsh-Healey Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35-45; 41 U. S. C. A. 35-45) was expressly made applicable to the contract of the government with this munition war contractor. The Court, evidently raising the point itself, held that the Walsh-Healey Act was applicable to the work of the plaintiff employees and that the Fair Labor Standards Act could not cover their activities; and that the Court, therefore, did not have jurisdiction. The Court concluded that the two acts are divergent and incompatible, stating at page 724:

“The Walsh-Healey Act is not an exercise by Congress of regulatory power over private industry or employment, nor an act of general application to industry.” (Citing authorities.)

In the case at bar, the cross-appellees were engaged in building ships for the United States Government pursuant to contracts between cross-appellant and the United States Maritime Commission [Tr. p. 7]. An exemplar of such contracts by stipulation of the parties [Tr. p. 7] is in evidence as Exhibit A. These were cost-plus-a-fee contracts [Tr. p. 98]. The shipyard was engaged in no activity except the production of these ships for the United States under these contracts [Tr. p. 99].

The government contracts expressly provided that a special Maritime Commission wage statute,⁵ enacted to cover Maritime Commission shipbuilding contracts, was applicable to the work under such contracts [Ex. A, p. 29, Article 20]. This wage statute expressly suspended the Eight Hour Laws⁶ as amended, providing that "laborers and mechanics" employed by a contractor of the Maritime Commission were to be paid on a "basic rate" of eight hours per day and forty hours per week, and for hours worked over eight a day or forty a week at not less than one and one-half times the basic rate of pay.

Approximately six months later, Congress by Public Law 247⁷ expressly required that the Maritime Commission Emergency Shipbuilding Program be subject to the provisions of the above Maritime Commission Wage Statute, proving in part (46 U. S. C. A. 1119(b)):

"The provisions of . . . the Act of October 10, 1940, Ch. 338, 54 Stat. 1092, shall apply to all activities and functions which the Commission is authorized to perform under Section 1119(a) of this title . . ."

It should be noted that this Public Law 247 is expressly referred to in the Government in Paragraph 1, page 1 of Exhibit A.

This Maritime Commission wage statute is obviously different from the Fair Labor Standards Act in its re-

⁵This law is set forth in full in the appendix, *infra*, Pub. Law 831, 76th Cong., Act of October 10, 1940, 54 Stat. 1092; 40 U. S. C. A. 326—note thereto.

⁶Public Law 781, 76th Cong.; 40 U. S. C. A. 321, *et seq.*

⁷Public Law 247, 77th Cong., enacted February 6, 1941, 55 Stat. 5, 6; 46 U. S. C. A. 1119 (a) (b).

quirements as to overtime as well as speaking of a "basic rate" rather than a regular rate. It requires "not less than" one and one-half times the basic rate of pay for work in excess of eight hours in a given day and hours in excess of forty in a week whereas the Fair Labor Standards Act has no such requirements. Further, it should be noted it was enacted (1940) after the Fair Labor Standards Act (1938). This wage statute refers and applies only to "laborers or mechanics." The Attorney General has stated that this phrase, as used in the Eight Hour Laws, *supra*, should be given a broad meaning (39 Op. Atty. Gen'l 232). Cross-Appellee Biggs worked in a warehouse issuing parts [Tr. p. 67]. Cross-Appellee Hector was a machinery repairman [Tr. p. 80]. Cross-Appellee Lueder was an electrician repairman [Tr. p. 104]. Cross-Appellee Moreno worked mechanical machinery [Tr. p. 59]. All of these men were doing manual and/or mechanical work and it is submitted that there is no question as to these men falling within the "laborer or mechanic" provisions of this Maritime Commission wage law.

In the *U. S. Cartridge Company* case, *supra*, the concurring opinion (also joined in by the Court) discussed at some length the broad powers conferred upon the Secretary of War by the National Defense Acts;⁸ and the Court observed that the effect of these laws was to give the Secretary of War possibly plenary over wages, contractors fees and other contract matters. That these broad powers conferred upon a Secretary of War were a strong

⁸Act of July 2, 1940, 54 Stat. 712, Ch. 508, 50 U. S. C. A. Appendix, 1171, *et seq.*, 5 U. S. C. A., Sec. 189(a).

argument for ruling the inapplicability of the Fair Labor Standards Act to the contract in that case. Similar national defense powers were given to the Maritime Commission by Congress in May, 1941.⁹ This Act gave the Maritime Commission authority to negotiate contracts to build ships without advertisements or bids and upon a cost-plus and negotiated fee basis. This Act further provided in subsection (b) that the Maritime Commission wage law, *supra*, would apply providing (50 U. S. C. A. Appendix 1261(b)):

“The provisions of Public Law Numbered 831, Seventy-sixth Congress, approved October 10, 1940 (54 Stat. 1092 (note under section 326 of Title 40)) (relating to compensation for all hours worked by laborers and mechanics in excess of eight hours per day or forty hours per week at not less than one-and-one-half times the basic rate of pay), shall apply in respect of any contract negotiated pursuant to subsection (a) hereof.”

All of these relevant Maritime Commission statutes pertaining to the special wage provisions were enacted after the Fair Labor Standards Act had become law. Thus, this Court is not faced with the problem confronting the Court in the *U. S. Cartridge Company* case, *supra*, where the Walsh-Healey Act, *supra*, had been enacted prior to

⁹Act of May 2, 1941, Ch. 84, 55 Stat. 148, as amended June 16, 1942, Ch. 416, 56 Stat. 370; 50 U. S. C. A. Appendix 1261.

the enactment of the Fair Labor Standards Act, thus affording argument that the latter amended the former.

Another parallel to the *U. S. Cartridge Company* case, *supra*, is the fact cross-appellant's contracts with the Maritime Commission required wages to be not less than the rates fixed by the Secretary of Labor under the Bacon-Davis Act¹⁰ and that said rates be posted in the shipyard [Ex. A, Article 19(d) pp. 28-29].

It is submitted that the same considerations and conclusions are present in a comparison of the applicable Maritime Commission laws to the Fair Labor Standards Act as were found by the Court in the *U. S. Cartridge Company* case, *supra*; and that the Fair Labor Standards Act has no application to cross-appellees' claims and therefore the District Court had no jurisdiction of this action.

(b) Are Cross-Appellant's Activities Covered by the Fair Labor Standards Act?

Since cross-appellant completely presented its views upon this issue to the Court in the *Mills* case, *supra*, no argument will be made in this case. It is noted that the United States Supreme Court will in time, *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 92 L. Ed. 1347, 68 S. C. 1031, pass on this question in so far as government contractors are concerned.

¹⁰Act of March 3, 1931, 46 Stat. 1494, 40 U. S. C. A. 276(a).

(c) Does the Master Labor Agreement Contain an Express Provision Making Lunch Period Time on the Swing and Graveyard Shifts a Compensable Activity?

1. Summary of Argument.

There is no provision in the Master Labor Agreement [Ex. 1] making the lunch period time compensable as to the swing and graveyard shifts and, therefore, the District Court has no jurisdiction as to these claims under Section 2(d) of the Portal-to-Portal Act of 1947.

2. Argument.

Cross-appellees by Paragraph VII of their complaint [Tr. pp. 4-5] have relied solely on the Master Labor Agreement to support the compensability of their lunch hour claims. This is further shown by the stipulation of the parties as to the issues in this case contained in a pre-trial stipulation [Tr. p. 9].

In the *Mills* case, *supra*, the Court held that Paragraph 4 of the Labor Agreement [Ex. 1] contained an express provision making the lunch period activity compensable. This express provision of Paragraph 4 reads as follows:

“Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week.”

Further, in that case, the Court held that the provisions of subsection (c) of Paragraph 5 of Exhibit 1, as to lunch period time, could not apply since there was no “employee’s time” to eat lunch. Subsection (c) of Paragraph 5 of the Agreement [Ex. 1] provides as to the

swing (second shift) and graveyard (third shift) as follows:

“Second shift: An eight (8) hour period less thirty minutes for meals on employee’s time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

“Third shift: A seven and one-half (7½) hour period less thirty minutes for meals on employee’s time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).”

By the above contract clause the lunch period time is not required to be thirty consecutive minutes, nor is there any fixed time required within a given shift that lunch period shall be taken. The reason for this is obvious, since in a large shipyard producing continuously around the clock, lunch periods by necessity would have to be staggered and sometimes broken up because of emergencies. Especially was this true during the war period. Mr. Mowrey, Supervisor of cross-appellee Hector, explained it in his testimony [Tr. p. 147]:

“Q. Isn’t it a fact, Hr. Mowrey, that your standing instructions to all of the men on this type of work were that in case of any emergency repair they must do it immediately? A. That is right.

Q. And that whether they were eating their lunch or whether they were doing anything else? A. That is right and if it did happen during the time they were eating their lunch, then the instruction was to eat that [*sic*] when they got done with the job. They were to go ahead and take their lunch period.”

Keeping in mind that in the *Mills* case, *supra*, the Court interpreted the Master Labor Agreement [Ex. 1] as to lunch period compensability on the *day shift* only (8½ hours per day), the issue now before the Court is whether Exhibit 1 contains an express provision as to lunch period time upon the swing and graveyard shifts in the light of Section 2 of the Portal-to-Portal Act of 1947, *supra*. Section 2(a) and 2(a)(1) provides:

“No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer;”.

Section 2(a) speaks of “any activity” and, therefore, makes no distinction upon the basis of productive and non-productive activities or upon any other basis.

Boerkoel v. Hayes Mfg. Co. (D. C. Mich. 1948),
76 Fed. Supp. 771;

Seese v. Bethlehem Steel Company (D. C. Md.,
1947), 74 Fed. Supp. 412 (aff’d 168 F. 2d 258);

Bateman v. Ford Motor Company (D. C. Mich.,
1948, 76 Fed. Supp. 178 (aff’d 169 F. 2d 266).

In the *Bateman* case, *supra*, Judge Picard (who originally heard and ruled on the well known *Mt. Clemens Pottery Company* case) stated (p. 180):

“These provisos applied to any employer liabilities whether based on activities prior to or after the Act’s enactment, making the act admittedly retro-active, and furthermore applying with equal force to claims which under previous decisions might have been considered meritorious as well as to fantastic ‘windfalls’ sought by the great majority of these so-called Portal-to-Portal suits”

Section 2(a)(1), above, as to the issue in this case, requires that the written contract [Ex. 1] contain an express provision making the particular activity claimed compensable. As to this portion of Section 2 of the Portal Act, it was stated in *Newsom v. du Pont de Nemours & Co.* (C. C. A. 6th, 1949), 173 F. 2d 856 (p. 859):

“In order that activities be expressly compensable under this provision they must be specifically described. A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force.”

It is cross-appellant’s contention that Paragraph 5(c), *supra*, of the Master Labor Agreement [Ex. 1], *expressly* describes and refers to lunch period time, and *expressly* makes this time a non-compensable “activity” irrespective of what the employee did during his lunch period time. For example, suppose an employee claimed compensation because he voluntarily preferred to work during his lunch period rather than eat lunch, well knowing his employment agreement specifically provided lunch period time would not be compensable. It is submitted that, obviously,

in this illustration the employee could not claim compensation under the Fair Labor Standards Act, as amended.

The case at bar is similar to the above illustration. The cross-appellees knew by their weekly pay checks no compensation was given for the lunch period whether they worked during that portion of their shift or not [Tr. p. 46]. *Cross-appellees were not told by cross-appellant they could not take thirty minutes to eat their lunches during their respective shifts* [Tr. pp. 57; 73-74; 85; 116]. Cross-appellees never complained of this matter at their union meetings [Tr. pp. 48-49, 65, 76, 109-110]. Union stewards were in the shipyard at all times to check on the welfare and working conditions of the employees and the stewards were aware of cross-appellees' lunch period activities [Tr. pp. 43-44, 65, 77, 143-144]. Thus, cross-appellees themselves by their conduct and actions during their employment put the very interpretation upon this labor agreement that cross-appellant now contends to be the correct one.

It is submitted that Paragraph 5(c) of the Labor Agreement constitutes an express provision of a written agreement negating the compensability of lunch period time within the meaning of Section 2 of the Portal-to-Portal Act of 1947.

DISTINGUISHING THE MILLS CASE.

In the *Mills* case, *supra*, the Court was interpreting the provisions of the Labor Agreement in the light of the day shift only. The day shift, counting the lunch period as time worked, was eight and one-half hours of working time; but in neither the graveyard nor swing shift does the addition of one-half hour lunch time make the total shift working time in excess of eight hours. It is, there-

fore, submitted that the portion of Paragraph 4 (set forth *supra*, p. 16) of the Labor Agreement held to constitute an express provision of compensability in the *Mills* case, *supra*, is not applicable to either the swing or graveyard shifts.

In the *Mills* case, *supra*, the Court was examining the Labor Agreement as to hours worked *in excess* of eight hours per day. In the case at bar, the lunch period time, on the swing and graveyard shifts, is work *under* eight hours a day and therefore the provision in Paragraph 4, *supra*, of the Labor Agreement is not applicable.

Section 2(b) of the Portal-to-Portal Act of 1947, *supra*, provides that the express provision in the written agreement must make the activity compensable during the portion of the *day* in which it was performed providing:

“For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.”

Thus, to satisfy the requirements of Section 2, the express provision of the contract must relate to payment for activities performed upon a day basis and not upon a basis of activities in excess of forty hours per week.

It is submitted that since the lunch period time on the swing and graveyard shifts was not work in excess of eight hours per day, the Master Labor Agreement [Ex. 1] fails to contain an express provision therein making work performed during the lunch periods a compensable activity; and that, therefore, the District Court is deprived of jurisdiction pursuant to the provisions of Section 2(d) of the Portal-to-Portal Act of 1947.

(d) Is There Any Evidence to Support the Finding That Cross-Appellee Biggs Worked During His Lunch Period Each and Every Day?

1. Argument.

The burden of proof to show hours worked for which not properly compensated is upon the cross-appellee.

Anderson v. Mt. Clemens Pottery Company, 328 U. S. 680, 90 L. Ed. 1515, 66 S. C. 1187.

The District Court found that cross-appellee Biggs was required to work each and every one of his lunch periods by its Findings of Fact No. 7 [Tr. p. 21]. However, the only evidence as to the number of lunch periods Mr. Biggs was required to work in the record of this case is his own testimony. By his own admission, both in his deposition taken before the trial and his testimony at the trial, the evidence establishes that he had at least two lunch periods a week that were entirely free and uninterrupted [Tr. pp. 74-75]. He testified [Tr. p. 75]:

“Mr. Sanders: More than once a week was his answer. Now I am asking him to give a better estimate if he can, your Honor. A. Well, it is pretty hard to say. As long as it was ‘more than once a week,’ maybe twice a week. It is more, I guess, than anything else. I didn’t keep no permanent record on it.”

It is submitted that as to Mr. Biggs a finding of lunch period worked more than four days a week (six-day work week) is not supported by the evidence.

Respectfully submitted,

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Attorneys for Appellee and Cross-Appellant.



APPENDIX.

Public Law 831, 76th Congress, Act of October 10, 1940, 54 Stat. 1092; 40 U. S. C. A. 326—note thereto.

“That until otherwise provided by law, provisions of law prohibiting more than eight hours’ labor in any one day of persons engaged upon work covered by United States Maritime Commission contracts for the construction, alteration, or repair of vessels shall be suspended: Provided, That the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any such contract shall be computed on a basic rate of eight hours per day and forty hours per week and work in excess of eight hours per day or forty hours per week shall be permitted upon compensation for all hours worked in excess of eight hours per day or forty hours per week at not less than one and one-half times the basic rate of pay.

“Sec. 2. The United States Maritime Commission is hereby authorized to modify its existing contracts for the construction, alteration, or repair of vessels as it may deem necessary to expedite national defense, and to otherwise effectuate the purposes of this act.

“Sec. 3. Nothing in this act shall be construed to modify any contracts between management and labor in shipyards which provide for conditions more favorable to labor than the minimum provisions as to hours per day and hours per week and for overtime provided in this act.

“Sec. 4. The provisions of this act shall terminate June 30, 1942, unless the Congress shall otherwise provide.”

(Res. June 16, 1942, c. 416, 56 Stat. 370, extended provisions of said Act Oct. 10, 1940, c. 838, 54 Stat. 1092, until six months after the end of the present war shall have been proclaimed, or such earlier time as Congress by concurrent resolution or the President may designate.)

No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and
MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.
and
CROSS-APPELLEES' BRIEF.

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No. 12257
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and
MARTIN M. MORENO,

Appellants,

vs.

YOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.
and
CROSS-APPELLEES' BRIEF.

PART I—APPELLANTS' REPLY BRIEF.¹

I. Appellants Were Credited With and Paid for Only Their Regularly Scheduled Shift Hours and Received No Credit or Pay for Their Work During Lunch Periods.

Appellee argues that the appellants were credited with and paid for 48 hours of work with overtime at time and one-half for the 8 hours in excess of 40. This, however, was not the case. As the contract clearly shows, the appellants were scheduled to work 45 hours per week on

¹This brief, like that of Appellee and Cross-Appellant, is in two parts, the first being Appellants' closing argument and the second being Appellants' and Cross-Appellees' reply to Cross-Appellants' opening brief.

the second shift and 42 hours per week on the third shift. They were paid for only those 45 and 42 hours, and for no additional hours. They were not paid for 48 hours; the figure 48 was simply used to compute the amount of pay for those 45 and 42 hours.² That the actual rate of pay was the "base rate" plus the time differential plus the percentage differential divided by the scheduled shift hours is clearly established by Appellee's own witness, Clair Irwin. He testified:

" . . . on graveyard they blew it up and paid actually, instead of seven and one-half hours plus one-half hour allowed time, they only paid them seven and one-half hours but the rate had been ballooned so he got the same amount of pay as if he had been working under the old schedule . . ." [Tr. p. 152.]

"Q. I see. In the case of Hector, whose rate before the week ending November 19, 1944, was \$1.72 and whose rate, as shown on the card for the week following 11-19-44 was \$1.97.1, that difference in rate did not represent an increase in pay for the man, did it? A. No.

Q. He got before that change that was made exactly the same amount of money for each hour he worked as he got after the change was made? A. That is correct.

²"Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%) . . . Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%)." [Ex. 1, par. 5.]

Q. In other words, then, Mr. Irwin, so that we understand your testimony, if Mr. Hector before the week of November 19, 1944, had come in on his graveyard shift and worked only two hours, and then gone home, he would have been paid two times \$1.97.1? A. That is right.

Q. Even though his basic rate, as shown on the card was \$1.72? A. Yes; that is right; that is right." [Tr. pp. 155-156.]

Thus Appellee's entire argument is based upon a premise which finds no foundation in fact. Its own examples given on page 8 of its Brief demonstrate the fallacy of the argument. In order to apply the examples to the fact situation here presented, the \$1.00 base rate must be translated into the actual rate per hour. By the testimony of Appellee's own witness, the actual rate per hour for the swing shift employee mentioned in the first example would be $\$1.06\frac{2}{3}$ (the 45 hours for which Appellee paid divided into \$48.00). For the 48 hours actually worked (45 hours scheduled plus 6 one-half hour lunch periods), Appellants should have been paid \$55.46 (40 hours x $\$1.06\frac{2}{3}$ plus 8 hours x $\$1.06\frac{2}{3}$ x $1\frac{1}{2}$).

The 1949 amendments to the Fair Labor Standards Act do not relieve Appellee of its liability to Appellants. Section 7(d)(6) upon which Appellee relies simply provides that the time and one-half paid in the enumerated instances shall not be included in the "regular rate." Neither the "time" allowance nor the percentage allowance are in any category listed in Section 7(d)(6), and Appel-

lants have never contended that the time and one-half paid for the sixth day worked in the work week served to increase the rate of pay.

Since the contract and the testimony of Mr. Irwin both establish that the "allowed hours" differential as well as the percentage differential were increases to be included in the regular rate of pay, and upon the further testimony of Mr. Irwin that the Appellants were not paid for the time involved herein [Tr. p. 155], the Appellants are entitled to compensation for their lunch periods worked at time and one-half the regular rates which include both of the shift differentials.

PART II—REPLY TO CROSS-APPELLANT'S OPENING BRIEF.

1. Cross Appellees Are Entitled to the Benefits of the Fair Labor Standards Act.

Cross-Appellant argues that the Cross-Appellees were not subject to the Fair Labor Standards Act at all, relying upon *U. S. Cartridge Co. v. Powell* (C. A. 8, 1949), 174 F. 2d 718, which held that the provisions of the Walsh-Healy Public Contracts Act and the Fair Labor Standards Act are mutually exclusive. As Cross-Appellant points out, certiorari has been granted by the Supreme Court, and Cross-Appellees respectfully submit that for the following reasons the soundness of this decision is open to serious question.

Nothing contained in either of the two acts there involved provide any basis for inferring that it was the intent of Congress that where one act would apply the other would not. If such an inference could be drawn the question might well be asked upon what basis can a court determine which of the acts should apply. In other words, in the *U. S. Cartridge Co.* case one would look in vain for a sound reason for holding the Walsh-Healy Act applicable but not the Fair Labor Standards Act. It would have been equally logical to hold the Fair Labor Standards Act applicable and not the Walsh-Healy. The simple fact of the matter is that both acts may apply and were intended by Congress to apply according to their terms: *i. e.*, where the performance of Walsh-Healy contracts also involves production of goods for commerce, both acts apply.

Concrete indication that Congress did intend both acts to be applicable and that one does not exclude the other may be found in Section 1 of the Portal-to-Portal Act of 1947, where Congress expressly finds that because of certain judicial interpretations of the Fair Labor Standards Act "the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased, the public Treasury would be seriously affected by consequent increased cost of war contracts." If Congress thought the Fair Labor Standards Act would not apply to the performance of contracts subject to the Walsh-Healy Act then there could be no basis for this finding.

Apart from the question as to its soundness, the *U. S. Cartridge Co.* case is not applicable to the case at bar since neither the employees nor the employer here were engaged in the performance of any contract subject to the Walsh-Healy Act. The rationale of the *U. S. Cartridge Co.* case was that the Walsh-Healy Act sets up a complete system of labor standards and establishes a complete procedure whereby the Government enforces those standards even to the point of collecting for the employees any wages due them by reason of failure to meet those standards. The Maritime Commission wage statute here involved makes no comparable provisions either for enforcement or for collection of wages. Nothing therein contained indicate any Congressional intent to substitute its provisions for the provisions set forth in the Fair Labor Standards Act.

2. The Master Labor Agreement Contains the Express Provisions Contemplated by Section 2 of the Portal Act for Making the Time Worked Involved Herein Compensable.

This court has had occasion to consider the precise question here presented and determined that the provisions of the Master Labor agreement made compensable the activities out of which Cross-Appellants' claims arise.

Mills v. Joshua Hendy Corp. (C. A. 9, 1948), 169 F. 2d 898.

Cross-appellant seeks to limit the effect of this holding to the day shift only. The decision in the *Mills* case on this point applied to both the day and the graveyard shifts. The same facts and the same principles apply with equal force to all three shifts.

An examination of the contract reveals that its express provisions define the shifts as constituting 8, 7½ and 7 hours of working time respectively and require the employer to pay time and one-half for all hours worked in excess of those defined shifts.

The cases deciding this problem on the merits³ uniformly support the decision of this court in the *Mills* case.

In *Central Missouri Telephone Co. v. Conwell* (C. A. 8, 1948), 170 F. 2d 641, the Court of Appeals ruled that certain inactive time of the employees while they were required to be on duty and subject to being called momentarily to perform duties, was compensable and that Section 2 of the Portal Act did not purport to affect its compensability.

³Cases which appear to reach a contrary result are invariably decisions which only involve the sufficiency of the pleadings.

In the recent case of *Frank v. Wilson & Co.* (C. A. 7, 1949), 172 F. 2d 712, the plaintiffs were mechanics who were required to be present, dressed and ready for work five minutes before the scheduled start of the shift. During that five minutes they received instructions, obtained tools, started out for their various places of work in the plant and performed similar activities which were also performed by them from time to time as occasion arose during their regularly scheduled hours of work. The union contract provided "Employees who are required to work over eight hours in any one day . . . will be paid one and one-half times their regular rate for all such overtime hours." The Court held that the activities performed within the five minutes before the shift were covered by the express provision of the written contract quoted above and were, therefore, compensable under the Fair Labor Standards Act as amended by Section 2 of the Portal Act.⁴ In support of its holding the Court referred to the decision of this Court in the *Mills* case and quoted that portion which set forth the contract provisions now before the Court.

In addition to the foregoing decisions of the Courts of Appeals for the Seventh, Eighth and Ninth Circuits, a

⁴The court below, in addition to interpreting that provision of the contract as meeting the requirements of Section 2, also held that the compensability of the activities by reason of custom or practice within the meaning of Section 2 was established by a showing that the same or similar activities were paid for when performed during the regular shift hours. In the case at bar by stipulation the issue has been narrowed to compensability by the express provisions of the contract, but the analogy is obvious. If custom and practice of paying for the activities during shift hours establish their compensability outside of shift hours, then clearly where the *contract* makes the activities compensable when performed during shift hours, it also makes them compensable when required to be performed outside of shift hours.

number of District Courts have reached the same conclusions.

McLaughlin v. Todd & Brown, Inc. (N. D. Ind., 1948), 15 Labor Cases, Par. 64606;

Green v. LeVan (E. D. Tenn., 1948), 15 Labor Cases, Par. 64777;

In the Matter of Kellett Aircraft Corp. (E. D. Pa., 1949), 17 Labor Cases, Par. 65347;

Knudsen v. Lee & Simmons (S. D., N. Y., 1949), 17 Labor Cases, Par. 65374.

3. The Evidence Establishes That Cross-Appellee Biggs, Like Each of the Other Appellants, worked During His Lunch Period Each and Every Day.

After describing his claim for lunch periods and defining his activities during those lunch periods, Mr. Biggs testified:

“Q. At any time during your shift were you relieved of your duties for the purpose of taking your lunch? A. No, sir.” [Tr. pp. 67-68.]

“ . . . I usually started to eat my lunch and I never did get a complete lunch eaten at one sitting. In other words, I would eat a sandwich, someone would come in or there would be a phone call or I would have to go hunt for a part, because there were certain employees in the yard, maintenance men there that came in at that time to get the parts.” [Tr. p. 69.]

Even if it were not for this and similar testimony, and if the testimony quoted by the Cross-Appellant were the only testimony on the point, nevertheless the court below

was bound to make its finding that Biggs worked during his lunch period each and every day.

The question of what constitutes time worked within the meaning of the Fair Labor Standards Act is not answered alone by whether or not actual duties were performed during each and every lunch period.

All courts which have passed upon the point have held or expressed the opinion that lunch periods must be counted as time worked unless the employee is relieved of all duties for a sufficient length of time to devote uninterruptedly to his own purposes.

Lofton v. Seneca Coal and Coke Co. (N. D. Okla., 1942), 6 Labor Cases, Par. 61,271, aff'd (C. A. 10, 1943), 136 F. 2d 359;

Walling v. Dunbar Transfer & Storage, Inc. (D. C. Tenn., 1943), 7 Labor Cases, Par. 61,565;

Sunshine Mining Co. v. Carver (D. C. Ida., 1941), 41 Fed. Supp. 60;

Tenn. C. I. & R. Co. v. Muscoda Local No. 1123 (D. C. Ala., 1941), 40 Fed. Supp. 4, 10, modified on other grounds, 321 U. S. 590;

Armour & Co. v. Wantock (1941), 323 U. S. 126;

Skidmore v. Swift & Co. (1944), 323 U. S. 134;

Fox v. Summit King Mines (C. A. 9, 1944), 143 F. 2d 926.

The evidence conclusively establishes that Biggs was not relieved of his duties but on the contrary was kept on duty during the entire period of his shift, including the scheduled lunch periods every day. He therefore is entitled to additional compensation for each and every day.

Conclusion.

The evidence establishes without contradiction that none of the Appellants was credited or paid for any time beyond the regularly scheduled shifts—which excluded the lunch periods. They were paid a time premium and a percentage premium strictly as shift differentials which served to increase their rates of pay. Neither constituted pay “for hours not worked.” No credit or payment having been received for lunch periods worked, Appellants are entitled to be paid for them.

Since the decision of *U. S. Cartridge Co. v. Powell* is under review by the Supreme Court and, it is respectfully submitted, is not sound in principle, it should not be given weight in support of Cross-Appellant’s argument. At all events, it is clearly distinguishable from the case at bar for the reason that the statute applicable to the performance of the contract here involved is not comparable in scope, design, intent or purpose to the Walsh-Healy Act applicable in the *U. S. Cartridge Co.* case.

The Appellants were required by their employer to remain on duty and perform the same activities during their lunch periods as during their shifts; the contract provided that lunch periods were excluded from the shifts and that the employees should be paid time and one-half for hours worked over and above their shifts. Accordingly, the

activities performed during the lunch periods were expressly made compensable by the terms of the contract.

Appellants respectfully submit, therefore, that the judgment of the court below should be reversed insofar as it denies them compensation for their work performed during their lunch periods on the swing and graveyard shifts and that it be affirmed in all other respects.

Respectfully submitted,

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No. 12,257

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PETITION TO INTERVENE.

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Pursuant to the order of this Court dated July 26, 1950, entitled "ORDER FIXING TIME WITHIN WHICH UNITED STATES MAY PETITION TO INTERVENE AND TO FILE BRIEF IN RESPONSE TO OPINION OF JUNE 28, 1950", the United States hereby petitions to intervene for the purpose of filing the brief submitted herewith in support of the constitutionality of the Fair Labor Standards Act Amendments of 1949, Act of October 26, 1949, Public Law 393, 81st Cong., 1st Sess.

The interest of the United States arises principally from the circumstance that the case of *Duane Moss, et al., Appellants v. Hawaiian Dredging Co., et al., Appellees*, and thirty-one cases consolidated therewith, are now pending on appeal in this Court, under Docket No. 12571, under an oral stipulation that a decision of this Court sustaining the constitutionality of said statute will dispose of the appeal in these thirty-two cases and result in an entry of judgment for the defendants in said cases. The issue is similarly involved in a large number of other cases defended by the United States on the basis of the constitutionality of the statute.

Dated, August 30, 1950.

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**BRIEF OF THE UNITED STATES
IN SUPPORT OF THE CONSTITUTIONALITY OF FAIR LABOR
STANDARDS ACT AMENDMENTS OF 1949, ACT OF
OCTOBER 26, 1949, PUBLIC LAW 393,
81ST CONGRESS, FIRST SESSION.**

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STANDARDS ACT AMENDMENTS OF 1949, ACT OF
OCTOBER 26, 1949, PUBLIC LAW 393,
81ST CONGRESS, FIRST SESSION.**

PRELIMINARY STATEMENT.

The decision of this Court dated June 28, 1950 rests upon a basis that certain sections of the Fair Labor Standards Act Amendments of 1949 might constitutionally be made retroactive by Section 16(e) of the statute.¹ In the concluding paragraph of the opinion,

¹Sec. 16(e). "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or

the Court extended to counsel an opportunity to be heard upon this question before the judgment of the Court should become final. Thereafter, by order dated July 26, 1950, the United States was granted leave to petition to intervene and file a brief on the constitutional question.

The United States petitioned to intervene because a determination that the statute is constitutional is material to the position which it has taken in defense of the action of *Duane Moss, et al., Appellants v. Hawaiian Dredging Co., et al., Appellees*, and thirty-one cases consolidated therewith, which are now pending on appeal in this Court, under Docket No. 12571, under an oral stipulation to the effect that judgment may be entered for the defendants in the thirty-two cases if the Court holds the amendatory statute to be constitutional. A similar defense has been advanced in numerous other cases defended by the United States.

SUMMARY OF ARGUMENT.

Seventeen decisions in nine Circuit Courts of Appeals, including the decision of this Court in the case of *Lassiter, et al. v. Guy F. Atkinson*, 176 F. (2d) 984, have upheld the constitutionality of the retro-

after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

active provisions of the Portal-to-Portal Act of 1947. *Certiorari* has been denied in six of these cases. These decisions are dispositive of the question of the constitutionality of the Fair Labor Standards Act Amendments of 1949 if the legal issues as to constitutionality are the same under the two statutes. The situations leading up to the enactment of the two statutes, and the constitutional issues, are indeed the same, and were so recognized by the Congress.

The findings of the Congress that the situation which was to be corrected by the retroactive amendment constituted a substantial burden on interstate commerce and the free flow of goods in commerce, and that it was the congressional purpose to relieve and protect interstate commerce from practices which burden and obstruct it, bring the case within the doctrine that determination of whether need exists for congressional action in a field within the plenary power of Congress, and a decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations such as do not exist in the present case.

Apart from the precedential significance of the Portal Act decisions, it is clear that the Fair Labor Standards Act Amendments of 1949 are not unconstitutional, since the statute is an exercise of sovereign powers under the commerce clause, falling short of an outright taking of property; and such an exercise of sovereign power is not precluded by the fact that there will result a disruption of existing contractual

relations or even a complete destruction of the benefits or value of contracts. Contracts, however expressed, cannot fetter the constitutional authority of Congress. When they deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

This is particularly true where the rights in question are created by, and conferred on private persons by, a statute passed in the exercise of plenary powers in aid of a dominant public interest. Rights thus created are not invalidated by the fact that they may affect or be in derogation of contractual arrangements existing at the time of their creation. Similarly, legislative modification of such rights is not prohibited by the circumstance that the modification affects arrangements made pursuant to the original enactment.

THE ACT OF OCTOBER 26, 1949, PUBLIC LAW 393, 81ST CONGRESS, FIRST SESSION, COMMONLY CALLED "FAIR LABOR STANDARDS ACT AMENDMENTS OF 1949", IS CONSTITUTIONAL.

It is assumed that this Court adheres to its decision in *Lassiter v. Guy F. Atkinson Co.*, 176 F. (2d) 984, upholding the constitutionality of the Portal-to-Portal Act of 1947.² This disposes of problems relating to

²A like result was reached in eight other circuits in the following cases:

Manofsky v. Bethlehem-Hingham Shipyards, Inc. (CCA 1), 177 F. (2d) 529;

P. L. 393 if the situation with respect to it, and the legal issues as to its constitutionality, are the same as those relating to the Portal Act.

The situations and the resulting issues are indeed the same. The following quotation from Senate Report No. 402 with respect to H. R. 858 shows that the Senate so believed and so found:³

“We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the

Battaglia v. General Motors Corp. (CCA 2), 169 F. (2d) 254, certiorari denied, 335 U.S. 887;

Darr v. Mutual Life Insurance Co. (CCA 2), 169 F. (2d) 262, certiorari denied, 335 U.S. 871;

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Rogers Cartage Co. v. Reynolds (CCA 6), 166 F. (2d) 317;

Busch v. Wright Aeronautical Corp. (CCA 6), 174 F. (2d) 322;

Lee v. Hercules Powder Co. (CCA 7), 171 F. (2d) 950;

Bumpus v. Remington Arms Co. (CCA 8), July 6, 1950, 9 WH Cases 484;

Role v. J. Neils Lumber Co. (CCA 9), 171 F. (2d) 706;

Potter v. Kaiser Co. (CCA 9), 171 F. (2d) 705;

Adkins v. E. I. du Pont de Nemours & Co. (CCA 10), 176 F. (2d) 661;

McDaniel v. Brown & Root, Inc. (CCA 10), 172 F. (2d) 466.

³While P.L. 393 was under discussion, Congress enacted H.R. 858 as Act of July 20, 1949, P.L. 177, 81st Cong., 1st Sess. The provisions of section 1 of P.L. 177 were the same, in substance, as those of section 7(d)(6) and 7(d)(7) of P.L. 393. Section 2 of P.L. 177 was the same as section 16(e) of P.L. 393. P.L. 177 was repealed by section 16(f) of P.L. 393, which, however, reenacted its provisions as above stated. The reports and discussion as to P.L. 177 are therefore relevant to our consideration of P.L. 393.

claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that Act—the ‘workweek’ in the portal-to-portal situation and ‘regular rate’ in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the Wages-and-Hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.”

The findings in Section 1 of the Portal Act, which were thus adopted by reference as applicable to P. L. 177, include those to the effect that the existing situation “constitutes a substantial burden on interstate commerce” and a “substantial obstruction to the free flow of goods in commerce”, and that the amending statute was enacted “to relieve and protect interstate commerce from practices which burden and obstruct it”.

These findings are important for the reason that the determination of whether a need exists for congressional action in a field within the plenary power of Congress, and decision as to the extent and efficacy of

the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations.

In *United States v. Darby*, 312 U.S. 100, in the course of its discussion upholding the constitutionality of the Fair Labor Standards Act against the charge that it unconstitutionally interfered with existing employment contracts, the Court said, at page 115:

“The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U.S. 27; *Sonzinsky v. United States*, 300 U.S. 506, 513 and cases cited. ‘The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.’ ”

In *Overnight Motor Co. v. Missel*, 316 U.S. 572, the employer took the position that the *Darby* case went no further than a holding that Congress could legislate against conditions detrimental to a minimum standard of living. It was argued that Congress could not constitutionally regulate rates of pay which were above such a standard, nor hours not injurious to health. The Court held, however, that the decision as to the need or efficacy of legislative enactments in aid of interstate commerce was the function of the Congress and not of the Courts, saying, at page 577:

“If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress’ power to use it to promote the employees’ well-being.”

Similarly in *Bunting v. Oregon*, 243 U.S. 426, where the issue was whether a State law regulating hours of labor in mines violated the Fourteenth Amendment, the Court said, at pages 437-438:

“But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. *Rast v. Van Denman & Lewis Co.*, 240 U.S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality.”

It is true that where contract rights are interfered with by a legislative enactment which is justified as an exercise of the police power or solely on the basis that the contract is charged with a public interest, the recitals in the legislation are not conclusive, and the Courts can examine into the facts to see whether the legislature has transgressed the limits of its powers. But the existence of an emergency is not a condition precedent to the right to exercise the police power or constitutional powers (*Veix v. Sixth Ward Assn.*, 310 U.S. 32, 38-40); and the burden of establishing invalidity is on the attacking party (*Weaver v. Palmer Bros.*, 270 U.S. 402, 410; *Minnesota Rate Cases*, 230 U.S. 352, 452); and the Courts are without power to strike down the legislation except on overwhelming proof of complete inappropriateness and unjustifiability of the statute. The true doctrine is stated by

Chief Justice Hughes in *Norman v. B & O RR Co.*, 294 U.S. 240. After having established the basic principle that Congress may regulate the currency even at the expense of contractual commitments and rights, he came to the point now under discussion—namely, the right or power of the Courts to pass upon the need or appropriateness of the legislation. At page 311 he said:

“Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisalment of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final.”

Continuing at page 313, he indicated the narrow limits of the Court's function in the following language:

“Can we say that this determination is so destitute of basis that the interdiction of the gold

clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?"

In the light of these pronouncements we turn to a statement of various facts which to us clearly show that the situation confronting the Congress was not so destitute of relationship to the well-being of interstate commerce as to empower the Court to interfere.

(a) Following the Supreme Court decision of June 7, 1948 in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, and as the date of expiration of the existing longshoremen's collective bargaining agreement in New York drew near, the employers and union found themselves unable as a practical matter to adjust the industry to the decision. A costly strike followed. A Board of Inquiry appointed by the President under the Labor Management Relations Act of 1947 reported the reality and sincerity of the impasse. A temporary arrangement was finally reached to bridge the gap until such time as remedial legislation might be enacted as recommended by the United States Department of Labor ("Hearings before Subcommittee of the Committee on Labor and Public Welfare, U. S. Senate, 81st Cong., 1st Sess. on S. 336 and H. R. 858", pp. 33-36, 554; cf. also letter of Secretary of Labor at p. 2).

(b) The same problem existed in other industries having similar types of contract (S. Rep. No. 402 on H. R. 858, pp. 5-6); and enactment of the amendment was advocated, through personal appearances or let-

ters, by a large number of industries other than longshoring. The statements and letters emphasize that clock-hour arrangements similar to that involved in the *Aaron* case exist in these other industries; that the construction placed on F.L.S.A. by the *Aaron* decision was not welcomed by either employers or employees in these industries; that attempted adjustments to meet the decision disrupted long-established and satisfactory collectively bargained agreements; that satisfactory adjustments were always difficult, and not infrequently quite impracticable; and that employers and employees had believed that their contracts met the requirements of F.L.S.A. as interpreted in Interpretative Bulletin No. 4.⁴

(c) The potential liability under the Supreme Court decision in the *Aaron* case, *supra*, was estimated as high as \$300,000,000 in the longshore industry (S. Rep. 402, p. 1; and statements by Supreme Court, 334 U.S. at fn. 1, p. 454), and as "substantial" in other industries (S. Rep. 402, p. 1).

(d) Not less than 137 cases brought on behalf of longshoremen were instituted between June 1943 and

⁴See Hearings before Senate Committee: Edison Electric Institute and other electric light and power companies (pp. 83, 117, 119, 194, 195); brewers (pp. 183, 194); Lumber Manufacturers Ass'n (pp. 181, 625); refrigerator and warehouse companies (pp. 190, 195, 613, 627); meat packers (pp. 123, 623); bakers (p. 401); Cotton Compress & Warehouse Ass'n (p. 335); machinery manufacturers (pp. 196, 615); gas companies (pp. 195, 618); plasterers, lathers and other building trades and general contractors (pp. 194, 610, 616); theaters (p. 194); candy makers (p. 605); sand and gravel and concrete mix (p. 605); printers (p. 613); paper manufacturers (p. 614); orchardists (p. 616); glass manufacturers (p. 621); ropes makers (p. 627); garment manufacturers (p. 629); grocery companies (p. 628).

June 1947. Not less than 200 additional suits were instituted shortly after the decision of the Court of Appeals for the Second Circuit, in the *Aaron* case.

(e) The Senate Subcommittee held extended hearings resulting in a record of 826 printed pages. They heard at length from employers and employees and Government officials; from counsel for plaintiffs in the pending East and West Coast longshoremen cases; and from representatives of C.I.O., A.F.L. and International Longshoremen's Association; and received a large amount of documentary material.

(f) There was no opposition to an amendment having prospective operation. Retroactivity "was opposed principally by counsel for claimants who have instituted suits to recover so-called 'overtime on overtime' ", and by C.I.O. A.F.L. did not oppose. The International Longshoremen's Association "strongly suggested the need of such relief". The bill originally had been limited to longshoring and the construction trades. There was "no serious objection" to broadening the bill to cover industry generally (S. Rep. 402, pp. 2-3).

(g) The reasons for the retroactive provision which were regarded by the committee as impelling include all those stated in Section 1 of the Portal Act as the basis for that legislation—namely, windfall payments in derogation of bona fide collective-bargaining agreements; the inequity of penalizing employees who stood by their agreements, and employers who acted in good faith; the fact that the claims sprang from the war-time exigencies; the absence of notice from the Wage

and Hour Administrator that the practices were illegal; the filing of suits deplored by A.F.L.; and the serious financial consequences of a failure to legislate. The committee concluded that "the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act". (S. Rep. 402, pp. 7-10.)

(h) It was the intent of Congress to destroy pending overtime-on-overtime claims in the longshore industry and in other industries under similar contracts and practices. (S. Rep. 402. See also debate on concurrence in the House of Representatives set forth in Congressional Record July 14, 1949, pp. 9670, 9671, 9674, 9677, 9679.)

(i) In response to an inquiry from the Committee, Mr. McComb, the present Wage and Hour Administrator, stated (Hearings before Subcommittee, p. 291):

"The position of the former Administrator with respect to premium rates of time and one-half for work performed on holidays, Saturdays, or Sundays was that such premiums were overtime pay and could be offset against any amounts required to be paid for overtime work by the Fair Labor Standards Act."

(j) The 1947 Annual Report of the Wage and Hours Public Contracts Division of the Department of Labor contained the following statement (Hearings before Subcommittee, p. 494):

"There are many other supplementary pay arrangements, however, which do not appear to undermine the overtime requirements of the act

and which are considered advantageous by both management and labor. These include certain types of profit-sharing plans and arrangements for time and one-half pay or better for work during specified hours of the day, or days of the week. The very purpose and desirability of such pay arrangements are frequently defeated by the requirement that such payments must be included in the regular rate of pay in computing overtime compensation. Some modification of the term 'regular rate of pay' appears to be necessary to permit the utilization of such arrangements in industry within the framework of the Fair Labor Standards Act without at the same time opening the gates for the widespread evasion of the intent of Congress."

(k) On February 18, 1949, the Secretary of Labor wrote the Committee in part as follows (Hearings before Subcommittee, p. 2):

"The Department of Labor favors prompt enactment of legislation such as is contained in S. 336 in order to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes in the industries affected by the proposed legislation. Expeditious action on this measure is necessary at this time in order to eliminate the imminent possibility that such disputes may occur when existing temporary arrangements in the longshore and stevedoring industries to meet the problem expire."

In the face of the foregoing, it is hard to see how any Court could question the sincerity or correctness

of the Congressional finding that enactment of P.L. 177 was necessary "to relieve and protect interstate commerce from practices which burden and obstruct it." Surely it cannot be said that there was no "reasonable relationship" between the existing situation and the well-being of interstate commerce. This being so, there is an end to the power of the Court to further consider or review the justification for the legislation.

We turn now to discussion of the basic issue of the constitutional limits of Congressional legislative power.

We believe that the problem has been confused at times by arguments which deal with the matter as one of confiscation of rights, when in reality no confiscation is involved.

There are a host of cases making it too clear to be questioned any longer that the exercise of sovereign powers in a manner not involving an outright taking of property for Government use is not precluded by the fact that there will result a disruption of existing contractual arrangements or even a complete destruction of the benefits or value of contracts. See, for example, imposition of maximum prices on sales of coal in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381; taking possession and operation of telegraph lines when deemed necessary for the national defense in *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163; the suspension of tariff provisions upon findings that the duties imposed by a foreign state are reciprocally unequal and unreasonable in *Field v. Clark*, 143 U.S. 649; the regulation of radio stations

according to public interest, convenience and necessity in *National Broadcasting Co. v. United States*, 319 U.S. 190; the prohibition of "unfair methods of competition" not defined or forbidden by the common law in *Federal Trade Commission v. Keppel & Brother*, 291 U.S. 304; and the allocating of marketing quotas among the states and producers in *Mulford v. Smith*, 307 U.S. 38; imposition of price controls under the Price Control Act of 1942, in *Yakus v. United States*, 321 U.S. 414; nullification of gold clause provisions in corporate bonds, as a result of regulation of the currency, in *Norman v. B&O RR Co.*, 294 U.S. 240; the imposition of a moratorium on foreclosure of mortgages in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398.

The controlling doctrine is stated by Justice Holmes in *Omnia Co. v. United States*, 261 U.S. 502. In that case the plaintiff had a valuable contract for delivery to him of the entire output of a particular plant, and the contract was wholly nullified by the taking over of the plant by the United States for war purposes. In denying a recovery for the resulting loss the Court said, at page 508:

"The contract in question was property within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking in the constitutional sense'".

At page 510 the Court said:

"For the consequential loss or injury resulting from lawful governmental action, the law affords

no remedy. The character of the power exercised is not material."

At pages 509-510 the Court quoted with approval the following statements from *Louisville & Nashville R.R. Co. v. Nottley*, 219 U.S. 467, 484:

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee*, 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of the contracts.'"

In *Norman v. B&O RR*, *supra*, the Court, at page 305, approved the conclusions reached in the legal tender cases, "that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract 'can extend to the defeat' of that authority", and that the Fifth Amendment referred only to a "direct appropriation". Passing on to the contention that "Congress is seeking not to regu-

late the currency, but to regulate contracts, and thus has stepped beyond the power conferred", the Court said, at pages 307-308:

"This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In many of the foregoing cases the rights which are interfered with, impaired, or destroyed existed under, and had all the sanctity which attaches to, private contracts. If such rights may be thus affected by exercise of sovereign powers, how much clearer is the power to interfere where, as in the present case, the asserted rights had no independent contractual origin, but had been created solely by an act of the sovereign and therefore presumably could be modified or withdrawn by the sovereign.

That rights created by statute, when not perfected by final judgment, may be destroyed by repeal or modification of the statute was decided in *Coombes v. Getz*, 285 U.S. 434, 447, 448; *Flannigan v. Sierra*, 196 U.S. 553, 560; and *Battaglia v. General Motors* (CCA 2), *supra*. The Supreme Court has clearly indicated its view that rights under F.L.S.A. fall into this category. In *Brooklyn Bank v. O'Neill*, 324 U.S. 697, they were described as "statutory rights con-

ferred on private parties, but affecting the public interest"; and as "private rights created by federal statute" (pp. 704-705). The refusal of the Court to validate releases was for the very reason that the rights were not subject to control by contract (pp. 707, 708). The right to liquidated damages was said to be merely one part of an entire remedy; and one section, 16(b), was said to "create the obligation for the entire remedy" (p. 711). At page 709 the rights of employees were described as of a "private-public character", and the Court said that "although this right to sue is compensatory, it is nevertheless an enforcement provision", in aid of attainment of the objectives of the Act.

The protection of rights fixed by final judgments is based on the policy of necessary repose and quieting of litigation and respect for the judicial branch—considerations which are not present in the present case. It is also to be noted that there is no basis for a claim that plaintiffs' rights have become "vested" because of an equity arising from a change of position in reliance on F.L.S.A. or its interpretation by the Wage and Hour Administrator or the Courts. The employment arrangement was made in the belief of both sides that it complied with F.L.S.A. In other words, it was not modified to incorporate F.L.S.A. provisions. At page 9 of Senate Report 402, attention was called to the fact that all that P.L. 177 really did was to affirm and validate contracts which were acceptable to the parties and which had been interfered with by the construction placed on them by the Supreme Court.

The constitutional power to modify F.L.S.A. surely can be no weaker than the power to superimpose F.L.S.A. on existing contracts at the time of its enactment and thus change existing rights and obligations. In *United States v. Darby*, 312 U.S. 100, and *Opp Cotton Mills v. Administrator*, 312 U.S. 126, the constitutionality of F.L.S.A. was upheld against charges that it violated the Tenth Amendment and the due process clause of the Fifth Amendment, and was an unconstitutional delegation of legislative power to the Administrator. The constitutional question arose again in *Overnight Motor Co. v. Missel*, *supra*, where an unsuccessful attempt was made to restrict the application of the statute to minimum wages and hours necessary to good health of employees. The refusal of the Court in *Brooklyn Bank v. O'Neill*, *supra*, to recognize the validity of settlements and releases for amounts less than the Act called for was an interference with the contracting rights of the parties. Thus the Act interfered with existing contracts in its inception. Since this is lawful, it must be equally lawful to interfere with the relationships which follow the passage of the Act. See, to this effect, the statement at page 577 in the *Missel* case, *supra*, that private contracts, whether before or after the passage of legislation, cannot take overtime transactions from the reach of dominant constitutional power. The subject matter is at all times within the control of the Congress.

CONCLUSION.

For all the foregoing reasons, we think it is clear that the Supreme Court has made repeated pronouncements which indicate that its denial of certiorari in the Portal Act cases was because it believed the Circuit Court rulings as to its constitutionality were correct; and that the same reasoning supports the constitutionality of P.L. 177 and P.L. 393.

Dated, August 30, 1950.

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No. 12,257

IN THE

United States
Court of Appeals

For the Ninth Circuit

EDWARD R. BIGGS, JOHN R. HECTOR, H. J.
LUEDER and MARTIN M. MORENO,
Appellants,

vs.

JOSHUA HENDY CORPORATION,
Appellee.

Motion of Pacific Maritime Association
for Leave to File a Brief as Amicus Curiae.
and
Brief of Pacific Maritime Association as
Amicus Curiae With Appendices

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IN THE

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Appellee.

**Motion of Pacific Maritime Association for Leave
to File a Brief as Amicus Curiae**

*To the Honorable, the Judges of the United States Court
Of Appeals for the Ninth Circuit:*

Now comes Pacific Maritime Association and respectfully moves that the Court grant leave to file the annexed brief *amicus curiae*, and that the Court consider it in support of the constitutionality of Section 16(e) of the Fair Labor Standards Amendments of 1949 (29 U.S.C., 2166).

The decision of this constitutional issue is of major significance. A large number of overtime-on-overtime suits are pending in various courts in the continental United States and in the Territory of Hawaii. Many of these in-

volve the longshore and stevedoring industry and seek recovery against members of this Association, whose membership includes virtually all Pacific Coast employers of longshore and stevedoring labor.

Pending in this court is *Duane Moss, et al. v. Hawaiian Dredging Co., et al.*, and consolidated cases, No. 12,571. In that group of cases the issue of the constitutionality of the Overtime-on-Overtime Act is being presented to the Court under an oral stipulation, arrived at in the hearing before this Court on June 19, 1950, that final judgment may be entered for the defendants if the Overtime-on-Overtime Act is held constitutional. Other cases, including many being defended by private employers as well as those defended by the United States, are pending in the District Courts in California, Washington and Hawaii. In at least one of these, counsel for the plaintiffs have specifically agreed with counsel undersigned that the complaints may be dismissed if the Overtime-on-Overtime Act is held constitutional.

Respectfully submitted,

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IN THE
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**Brief of Pacific Maritime Association
as Amicus Curiae**

PRELIMINARY STATEMENT

The constitutional issue before this Court is the validity of Section 16(e) of Public Law 393, 81st Congress, 29 U.S.C. 216b. This reads:

“No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such

work was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

This is a reenactment of the provision of Section 2 of Public Law 177, 81st Congress. This provision, plus the substantive changes of Section 7 of the Fair Labor Standards Act of 1938 referred to therein, constitute what has become popularly known as the "Overtime-on-Overtime Act."

In the instant case this Court handed down its opinion on June 28, 1950, giving effect to the Overtime-on-Overtime retroactive provision. The result was to require the employer to pay the full amount of overtime compensation required by law while giving him credit for all overtime compensation previously paid as required by contract. Thus the plaintiffs were awarded full overtime compensation without giving them "overtime on overtime."

ARGUMENT

The Overtime-on-Overtime Act was intended by Congress to provide a workable assimilation of contractual and statutory provisions for the payment of overtime compensation.

To do this, Congress has provided that there shall be no pyramiding of statutory overtime on top of contractual overtime. Overtime premium payable under a labor contract may be excluded from the computation of the regular rate of pay under the Fair Labor Standards Act and may be credited against any overtime premium due under that Act. With this being assured, employers and labor organ-

izations are free to enter into collective bargaining arrangements to give overtime conditions better than the minimum established by law. This is why organized labor, employers, and the government joined in expressing the need for this legislation.¹

The retroactive provision was added in the Senate after exhaustive hearings on the subject. On the basis of these hearings, the Congress concluded that the overtime-on-overtime claims were of the same nature as, and indistinguishable from, the Portal-to-Portal claims and that the flood of overtime-on-overtime claims was a burden on interstate commerce that, like the earlier flood of Portal-to-Portal claims, threatened the free flow of commerce. Following the example of portal-to-portal, another retroactive modification of the Fair Labor Standards Act was enacted to protect commerce.² This, the Overtime-on-Overtime retroactive provision, is accordingly in the mold of retroactive modification of the Fair Labor Standards Act used in Section 2(a) and Section 9 of the Portal-to-Portal Act.³

The Overtime-on-Overtime retroactive provision is constitutional for the same reasons that sustain these other retroactive modifications of the Fair Labor Standards Act. *It is a proper exercise of the Congressional power to regulate interstate commerce.* This power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its

1. See the House Committee's Report accompanying H. R. 858 printed in part as Appendix A, particularly p. 3.

2. See the Senate Committee's Report accompanying H. R. 858 printed in part as Appendix B, particularly pp. 12, 13.

3. The language of each of these is set forth in Appendix C.

utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The sovereignty of congress, though limited to specified objects, is plenary as to those objects. . . . The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse."⁴ In the exercise of this power, Congress may use an unreviewable judgment in fashioning remedies to foster and promote commerce by removing burdens and obstructions to its free and uninterrupted flow, and even to prevent commerce from promoting physical, moral or economic evil. "*This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts.*"⁵

The constitutionality of retroactive modifications of the Fair Labor Standards Act is fully established. All the constitutional arguments attacking them have been fully disposed of in several opinions.⁶ So clear is the case, that the later opinions of the Courts of Appeal, including three op-

4. *Gibbons v. Ogden*, 9 Wheat 1, 196, 197.

5. (Italics added) *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 705, and cases cited at 705 and 706. See also *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, cases cited at pp. 307-311; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747.

6. *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Cir.); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir.); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.); cert. den. 335 U.S. 887; *Darr v. Mutual Life Ins. Co.*, 169 F.2d 262 (2nd Cir.) cert. den. 335 U.S. 871; *Fisch v. General Motors Corp.*, 169 F.2d 266 (6th Cir.) cert. den. 335 U.S. 902.

inions of this Court, have upheld the constitutionality of the retroactive modifications without any extended discussion of the arguments.⁷

“Up to now every decision has upheld the constitutionality of the [Portal-to-Portal retroactive] statute. The unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain. In addition to this unanimity among District Courts and Courts of Appeals there is the uniform refusal of certiorari by the Supreme Court. We have been taught that a denial of certiorari does not mean Supreme Court approval of a Court of Appeals position. But in this particular situation where there have been eight denials involving the same constitutional questions, we think that the series of denials is not without an implicit significance with regard to the Supreme Court’s attitude upon the question involved.”⁸

Turning to the Constitutional arguments considered in the principal opinions, it is clear there is no Constitutional difference between the Portal-to-Portal and the Overtime-on-Overtime retroactive modifications of the Fair Labor Standards Act. Indeed, the District Court, after study of

7. *Potter v. Kaiser Co.*, 171 F.2d 705 (9th Circ.); *Rose v. J. Neils Lumber Co.*, 171 F.2d 706; *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9th Circ.); *Atallah v. Hubbert & Co.*, 168 F.2d 993 (4th Circ.), cert. den. 335 U.S. 868 *sub nom Cingrigrani v. Hubbert*; *Lasater v. Hercules Powder Co.*, 171 F.2d 263 (6th Circ.); *Lee v. Hercules Powder Co.*, 171 F.2d 950 (7th Circ.); *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466 (10th Circ.); *Newsome v. E. I. duPont de Nemours & Co.*, 173 F.2d 856 (7th Circ.), cert. den. 338 U.S. 824; *Busch v. Wright Aeronautical Corp.*, 174 F.2d 322 (6th Circ.); *Adkins v. E. I. duPont de Nemours & Co.*, 176 F.2d 661 (10th Circ.); *Manosky v. Bethlehem-Hingham Shipyard*, 177 F.2d 529 (1st Circ.).

8. *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713 (3rd Circ.).

this in the *Moss* case, concluded that "the issue of constitutionality as raised is not substantial."⁹

These provisions are retroactive, but it is well established that *retroactive laws are not prohibited by the Constitution in civil cases*. The courts have no power to declare an Act of Congress void upon that ground alone.¹⁰

The retroactive provisions admittedly have affected property rights. "What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce."¹¹ These rights are purely statutory. They are but the incidental product of a regulation of commerce. They are rights of a "private-public character"¹² and so peculiarly subject to modification, control or abolition in the public interest. *Being "purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment."*¹³

9. Tr. in No. 12571, pp. 54, 55.

10. *Fisch v. General Motors Corp.*, 169 F.2d 266, 271, 272, **upholding Portal-to-Portal**, citing *Blount v. Windley*, 95 U.S. 173, 180; *Watson v. Mercer*, 8 Pet. 88, 110. See also *Calder v. Bull*, 3 Dall. 386, 390; *Stephens v. Cherokee Nation*, 174 U.S. 445, 477, 478; *Johannessen v. United States*, 225 U.S. 227, 242.

11. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64.

12. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 709.

13. *Rogers Cartridge Co. v. Reynolds*, 166 F.2d 317, 321, which was relied upon by this Court in sustaining Section 9 of the Portal-to-Portal Act in *Lassiter v. Guy F. Atkinson*, 176 F.2d 984, 986. See also, **upholding Portal-to-Portal**, *Battaglia v. General Motors Corp.*, 169 F.2d 254, 259; *Fisch v. General Motors Corp.*, 169 F.2d 266, 271: "It is nothing short of a paradox to say that the Congress could not abolish this previously granted right if it concluded that the public interest required a change."

A contention has been made that some statutory over-time pay rights are of a contractual nature. This contention, self-contradictory on its face, is of no consequence even if it were meritorious. Private persons cannot by contract take themselves outside of the power of Congress to regulate commerce.¹⁴ Every contract has read into it the reservation of essential attributes of sovereign power as the postulate of the legal order.¹⁵ Any contractual arrangements that were initially subject to the commerce power as exercised in the Fair Labor Standards Act must, in turn, be subject to that power if its exercise changes that Act. *Such a statutory change may constitutionally render that contract unenforceable or impair its value.*¹⁶ "The power of Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy."¹⁷

14. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 308.

15. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435.

16. *Battaglia v. General Motors Corp.*, 169 F.2d 254, **upholding Portal-to-Portal**, quoting *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482, 485, 486 and citing *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-309; *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228, 229; *Scranton v. Wheeler*, 179 U.S. 141, 162, 163.

See also, **upholding Portal-to-Portal**, on this "contractual right" point, *Darr v. Mutual Life Ins. Co.*, 169 F.2d 262, 266; *Fisch v. General Motors Corp.*, 169 F.2d 266, 270, 271; *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713.

17. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 310.

CONCLUSION

The constitutionality of retroactive modifications of the Fair Labor Standards Act, whether Portal-to-Portal or Overtime-on-Overtime, was summed up by the Court of Appeals for the Fourth Circuit in the *Seese* case:¹⁸

“The Fair Labor Standards Act did not provide payment for employees engaged in that commerce but means by which wages might be regulated through application of maximum and minimum standards. When it was learned that this instrument of regulation was about to be used in such way as to injure the very commerce that it was designed to help, it is idle to say that Congress was without power to amend it in such way as to avoid the evil that was threatened.”

Respectfully submitted,

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*Attorneys for Pacific
Maritime Association.*

18. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 63.

(Appendices follow)



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Appendix A

81ST CONGRESS }
1ST Session } HOUSE OF REPRESENTATIVES { REPORT
No. 121

CLARIFYING OVERTIME COMPENSATION IN CERTAIN INDUSTRIES UNDER THE FAIR LABOR STANDARDS ACT

FEBRUARY 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. LESINSKI, from the Committee on Education and Labor, submitted the following

R E P O R T

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(a) Page 1, line 7, after the word "employee" and before the dash, insert "employed in the longshore, stevedoring, building and construction industries."

(b) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

STATEMENT

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the Fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co. v. Aaron* and *Huron Stevedoring Corp. v. Blue* (335 U.S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

Appendix B

Calendar No. 391

81ST CONGRESS {
1st Session }

SENATE

{ REPORT
No. 402

CLARIFYING OVERTIME COMPENSATION UNDER
THE FAIR LABOR STANDARDS ACT
OF 1938, AS AMENDED

MAY 18 (legislative day, APRIL 11), 1949.—Ordered to be printed

Mr. HILL, from the Committee on Labor and Public Welfare,
submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the long-shore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

STATEMENT

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the

so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc. v. Aaron* (334 U.S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is \$10,000,000, but other estimates for these industries range up to a figure approximating \$300,000,000. In other industries, such as electric and gas utilities, where continuous operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial defini-

tion of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay¹ for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the longshore, stevedoring, building, and construction industries. There was testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retro-

1. A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

active to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime." They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for

the future. We have also concluded that the bill should be made general in its application.

* * * * *

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims

arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime requirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was $8\frac{1}{2}$ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from \$10,000,000 to approximately \$300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agree-

ment. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between \$100,000 and \$250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment against the plaintiffs on the basis of this defense. (See *Moss v. Hawaiian Dredging Co.*, decided March 30, 1949, Case No. 25299-G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore, recommends that the bill include a provision for retroactivity. Precedent for such a

retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U.S. 680). Under section 3 (d) of that act, Congress retroactively validated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte v. Gangi* (328 U.S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp. v. Local No. 6167, UMW* (325 U.S. 161), and *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel v. Overnight Motor Transportation Co.*, 126 F.(2d) 98, 111, affirmed 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries*, 140 F.(2d) 826, 829.)

* * * * *

We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that act—the "workweek" in the portal-to-portal situation and

"regular rate" in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the wages-and-hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.

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*Appendix C*EXCERPTS FROM
TEXT OF PORTAL-TO-PORTAL PAY ACT
OF 1947

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

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SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.

—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

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